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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 207

EMORY S. LAND (CHAIRMAN, UNITED STATES MARITIME COMMISSION); [illegible] (VICE CHAIRMAN, UNITED STATES MARITIME COMMISSION), ET AL., PETITIONERS

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR ESTATE, COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JUNE 19, 1946

CERTIORARI GRANTED OCTOBER 14, 1946

SUPREME COURT OF THE UNITED STATES

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EMORY S. LAND (CHAIRMAN, UNITED STATES MARITIME COMMISSION), HOWARD L. VICKERY (VICE CHAIRMAN, UNITED STATES MARITIME COMMISSION), ET AL., PETITIONERS,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR ESTATES COMPANY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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1 In the District Court of the United States for the District of Columbia

Civil Action File No. 31468

R. STANLEY DOLLAR (AN INDIVIDUAL), 311 CALIFORNIA STREET, SAN FRANCISCO, CALIF.; DOLLAR STEAMSHIP LINE (A CALIFORNIA CORPORATION), 311 CALIFORNIA STREET, SAN FRANCISCO, CALIF., THE J. HAROLD DOLLAR ESTATES COMPANY (A CALIFORNIA CORPORATION), 311 CALIFORNIA STREET, SAN FRANCISCO, CALIF.; H. M. LORBER (AN INDIVIDUAL), 311 CALIFORNIA STREET, SAN FRANCISCO, CALIF., PLAINTIFFS

v.

EMORY S. LAND (CHAIRMAN, UNITED STATES MARITIME COMMISSION), 2500 MASSACHUSETTS AVENUE NW., WASHINGTON, D. C.; HOWARD L. VICKERY (VICE CHAIRMAN, UNITED STATES MARITIME COMMISSION), 4420 DEXTER STREET NW., WASHINGTON, D. C.; EDWARD MACAULEY (MEMBER OF THE UNITED STATES MARITIME COMMISSION, 3139 DUMBARTON AVENUE NW., WASHINGTON, D. C.; JOHN M. CARMODY (MEMBER OF THE UNITED STATES MARITIME COMMISSION), 2101 CONNECTICUT AVENUE, NW., WASHINGTON, D. C.; RAYMOND S. MCKEOUGH (MEMBER OF THE UNITED STATES MARITIME COMMISSION), DEPARTMENT OF COMMERCE BUILDING, WASHINGTON, D. C., DEFENDANTS

Complaint for injunction, mandamus and other relief

Filed Nov. 6, 1945

The plaintiffs for their cause of action allege:

1. That, this cause of action arises under the Constitution and laws of the United States [the Fifth Amendment to the Constitution of the United States], section 207 of the Merchant Marine Act, June 29, 1936, C. 858, Title II, section 207, 49 Stat. 1988, as amended June 23, 1938, c. 600, section 2, 52 Stat. 954, as hereinafter more fully appears.

2 2. That, the value of the rights which plaintiffs in this suit seek to protect and the value of the property and property rights and the extent of the injury involved herein exceeds three thousand dollars.

3. That the plaintiffs are all citizens of the United States.

4. That, the plaintiffs, R. Stanley Dollar (an individual), H. M. Lorber (an individual), are all residents of the state of California and maintain their business offices at 311 California Street, San Francisco, Calif.

5. That, the plaintiffs, Dollar Steamship Line (a California corporation), the J. Harold Dollar Estates Company (a California corporation), are all residents of the state of California and maintain their business offices at 311 California Street, San Francisco, Calif.

6. That, the plaintiff, Dollar Steamship Line, is a corporation organized and existing under the laws of the state of California, with its principal place of business located at 311 California Street, San Francisco, California, and said plaintiff is and has been for over fifty years engaged in the shipping business.

7. That, the J. Harold Dollar Estates Company is a corporation organized and existing under the laws of the state of California, with its principal place of business located at 311 California Street, San Francisco, California, and said plaintiff is engaged in the operation and maintenance of properties.

8. That, the defendant, Emory S. Land, is a citizen of the United States, a resident of the District of Columbia and resides at 2500 Massachusetts Avenue NW., Washington, D. C.; Howard L. Vickery, Vice Chairman of the United States Maritime Commission, is a resident of the District of Columbia and resides at 4420 Dexter Street NW., Washington, D. C.; Raymond S. McKeough, Associate member of the United States Maritime Commission, upon information and belief, is a resident of the District of Columbia, address unknown; Edward Macauley, Associate member of the United States Maritime Commission is a resident of the District of Columbia and resides at 3139 Dumbarton Avenue NW., Washington, D. C.; and John M. Carmody, Associate member of the United States Maritime Commission, is a resident of the District of Columbia and resides at 2101 Connecticut Avenue NW., Washington, D. C., in which capacities said defendants are charged with the administration of the shipping laws of the United States.

9. That, in the period of four years prior to 1928, the predecessor in interest of the party plaintiff, the Dollar Steamship Line (a corporation) was engaged in a round-the-world freight and passenger steamship service, operating vessels purchased from the United States and successfully operated for that purpose without the benefit of governmental subsidy or public aid of any character.

10. That, in 1928, the predecessor in interest, the Dollar Steamship Line Inc., Ltd., a Delaware corporation (now the American President Lines, Ltd.), initiated an enterprise in trans-Pacific trade and a further development of its round-the-world service, and in conjunction therewith entered into contracts for the construction and acquisition of two trans-Pacific lines and entered into contracts with the United States, represented

by the United States Shipping Board, from which funds were borrowed and obligations assumed for the purpose of enabling the Dollar Steamship Lines, Inc., Ltd., to complete said vessels, and contracts were entered into with the United States for the carriage of mails.

11. That, this enterprise of the Dollar Steamship Lines, Inc., Ltd., was entered into upon reliance on these contracts with the United States, and the obligations were assumed, the vessels constructed and service initiated and developed in reliance thereon.

12. That, said vessels were completed and said steamship service maintained in accordance with the law and the obligations of the company continuously until June 30, 1937, when the United States cancelled its contracts with the company for the carriage of the mails, upon which the company had faithfully relied in the construction of said vessels and instituting, maintaining and developing said service. Effective June 30, 1937, Congress cancelled all Ocean Mail Contracts and in lieu thereof provided, for direct operating-differential subsidies to equalize construction and operating handicaps of American operators. However, the Maritime Commission refused, except on impractical conditions, to grant the company an operating-differential subsidy in substitution for the cancelled mail contracts as provided by law.

13. That, notwithstanding the cancellation of added mail contracts and the withdrawal of Government aid in this form, the company continued to maintain service without Government aid or assistance in any form until January 25, 1938, when the United States Maritime Commission for the first time granted to the company a temporary operating differential subsidy in pursuance of an operating differential subsidy contract between the company and the Commission of that date. Said operating differential subsidy contract was granted, solely on the condition acceded to by the company that its capital be increased in the sum of five hundred thousand dollars, and upon the further condition that the claims of all trade creditors of the company be satisfied by only twenty percent in cash and the balance by preferred debenture obligations and preferred stock of the company.

14. That, in addition the said operating differential subsidy was conditioned upon the release of other debts owing by the company in exchange for preferred stock thereof. To accomplish this purpose the company was compelled to and did enlarge its capital by the creation of four million dollars in par value of preferred stock, which was issued in exchange for said additional capital contributed and for the release of said obligations.

15. That, on and after January 25, 1938, the issued and outstanding stock of said company was as follows:

34,243 shares of preferred stock of the par value of $100 each
252,000 shares of A stock
2,100,000 shares of B stock

2,386,243

16. That, at that time plaintiffs and the predecessor in interest of the plaintiffs were the owners of 14,304 shares of said preferred stock, 2,100,000 shares of B stock and 113,206 shares of A stock, or a total of 2,227,510 shares.

17. That, at the time said operating differential subsidy contract was entered into with the United States, the company claimed and asserted that said subsidy was inadequate and insufficient in amount and in that respect failed to conform with the provisions and requirements of the shipping laws of the United States and in particular the Merchant Marine Act of 1936.

18. That, nevertheless the company was compelled to make said contributions to capital, reorganize its capital structure and accept said insufficient operating differential subsidy in the amount allowed by the United States Maritime Commission, or face the inability to carry on its operation and maintain service and meet its obligations as they accrued.

19. That, upon the expiration of said operating differential subsidy contract, on July 25, 1938, the said United States Maritime Commission failed and refused to extend the said operating differential subsidy contract or to enter into a new operating differential subsidy contract with the company, although the said Commission well knew that the company would be financially unable to carry on its operations and meet its obligations as they accrued without Government assistance as authorized by law, in accordance with the provisions of the said Merchant Marine Act of 1936.

20. That, no other or further contract or operating differential subsidy was granted to said company and no new contract for that purpose was made until August 15, 1938.

7. 21. That, the said United States Maritime Commission notified the company that no further operating differential subsidy or contract, therefore, would be made with it, unless and until it should comply with certain demands, including a demand that it enter into a contract in the form hereinafter set forth, providing, among other things, that certain of the stockholders of the company, that is, the plaintiffs and their predecessors in interest, should transfer to the United States Maritime Commission contrary to the express provisions of the shipping laws of the United States, shares of A and B stock held by the plaintiffs. Said shares so held by said shareholders, the plaintiffs herein,

represented 92% of the voting control and the management of the company.

22. That, the company was then and there faced with the alternative of executing and surrendering the said shares of stock or faced the inability of meeting their obligations as they accrued including obligations to the United States itself.

23. That, accordingly acting under the intimidation and threat of bankruptcy and the inability to meet its obligations, including obligations to the United States itself, the company was involuntarily forced to and did enter into said contract of August 15, 1938, a full, true and correct copy of which is annexed hereto as exhibit A and is expressly incorporated herein and made a part hereof as set forth in full.

24. That, after said contract had been fully executed between the United States Maritime Commission and the plaintiffs
8 said Maritime Commission amended said contract and entered into a supplemental contract with the plaintiffs on August 19, 1938.

25. That, said contracts were entered into pursuant to section 207 of the Merchant Marine Act of 1936, as amended, which section reads as follows:

"The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this chapter or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. All the Commission's financial transactions shall be audited in the General Accounting Office according to approved commercial practice as provided in the Act of March 20, 1922, ch. 104, 42 Stat. 444: PROVIDED, That it shall be recognized that, because of the business activities authorized by this chapter, the accounting officers shall allow credit for all expenditures shown to be necessary because of the nature of such authorized activities, notwithstanding any existing statutory provision to the contrary. The Comptroller General shall report annually or oftener to Congress any departure by the Commission from the provisions of this chapter. June 29, 1936, c. 858, Title II, 207, 49 Stat. 1988; June 23, 1938, c. 600, 2, 52 Stat. 954."

26. That, the operating differential subsidy granted to the company upon the execution of the said contracts of August 15, 1938, and August 19, 1938, exceeded in amount the temporary subsidy granted to the company in the first six months of that year, thus demonstrating that the United States Maritime Commission had created the financial distress of the company not only by denying

the company the benefit of an adequate operating differential
9 subsidy contract from July 25, 1937, to January 25, 1938, but by granting an inadequate and insufficient subsidy for the following six months period.

27. That, thereafter, the company's operations were profitable and by virtue of an adequate subsidy contract and favorable trade conditions the company was enabled to and did thereafter pay and discharge all of its financial obligations, including all debts of the company and all of its obligations to the United States.

28. That, after the execution of said contracts of August 15, 1938, and August 19, 1938, the plaintiffs and their predecessors in interest caused said shares of stock of the company to be transferred to the United States Maritime Commission.

29. That, although such transfer was in fact and in legal effect collateral security for the indebtedness of the company to the United States Maritime Commission, nevertheless after the satisfaction of all of said debts and obligations to the United States, the defendants have asserted and claimed, and do now assert and claim that the United States is the lawful owners of the shares of stock so transferred by the plaintiffs to the United States Maritime Commission.

30. That, the indebtedness of the company to the United States for which said shares were transferred as collateral security, amounted to approximately $7,500,000 in principal amount, all of said amount having been fully satisfied and accordingly the indebtedness for which the stock has been transferred as collateral no longer exists.

10 31. That, the contract between the plaintiffs and the United States Maritime Commission was unauthorized and prohibited by express provisions of the Merchant Marine Act of 1936, as amended.

32. That, said contracts therefore are unenforceable, that no legal rights of either party could be effected under said contracts, that said contracts are void for all purposes and effects, and that the United States Maritime Commission could not acquire legal title to the plaintiffs' stock pursuant to the terms of the illegal agreements.

33. That, the plaintiffs allege that there now is in the possession of the defendants 2,386,243 shares of corporate stock in the name of the American President Lines, Ltd., a corporation existing under the laws of the state of Delaware, the legal title thereto being vested as a matter of law in the plaintiffs, which the defendants refused to return or deliver to said plaintiffs although formal demand has been made upon them, which stock the defendants are unlawfully retaining and are about to sell at public

offer to third parties, to the irreparable damage and detriment of the plaintiffs' legal right to said stock.

34. That, the plaintiffs made demand upon the Maritime Commission for the return of said stock in July, 1945. This request was denied by the Maritime Commission in July, 1945. Thereafter plaintiffs requested reconsideration of the matter which was granted. However, on November 5, 1945, the plaintiffs were informed that the stock will not be returned to the plaintiffs, and the plaintiffs assert, on information and belief, that the said stock will be sold on or before November 10, 1945.

11 35. That, defendants in total disregard for the rights of the plaintiffs unlafully warranted prospective purchasers of said stock, that said defendants would, if litigation developed in the unlawful sale of the stock by the defendants, reimburse such purchasers in cash from the funds of the United States, such monies as said purchasers had deposited with the defendants for the purchase of said stock, contrary to law.

36. That, the plaintiffs therefore are obliged and forced under the circumstances to restrain said defendants without benefit of notice from consummating the proposed illegal sale and disposition of the plaintiffs' stock, as said sale and disposition would constitute an irreparable injury and loss to the plaintiffs.

37. That, the plaintiffs have a legal right to the stock which must be protected against the tortorous invasion by officers of the United States Government, acting not only in excess of the powers validly conferred under the provisions of the Merchant Marine Act of 1936, as amended, but by actions which directly contravene the provisions of said Act.

38. That the plaintiffs have no adequate remedy at law.

39. That, if the plaintiffs be denied the relief requested herein, this honorable court will be giving effect to an unauthorized, illegal, void and unenforceable contract between the immediate parties, contrary to public policy, the constitution and laws of the United States.

12 Wherefore the plaintiffs being without a remedy in the premises, except in the court of equity pray judgment as follows:

1. That a temporary restraining order be issued immediately against the defendants and each of them, their agents, assistants, deputies, and employees, and all persons acting or assuming to act under their direction, enjoining and restraining them until the further order of the court from selling, offering to sell, disposing or offering to dispose of the plaintiffs' stock consisting of 2,386,243 shares of the American President Lines, Ltd., which stock is now in the possession and custody of the defendants.

2. That the court take jurisdiction of this cause and the parties hereto and of the subject matter hereof and that a writ of summons may be granted to the plaintiffs to be directed to the defendants herein, requiring said defendants to appear on a certain day before the court, and then and there make full, true, direct and perfect answer to this complaint.

3. That this Honorable Court, immediately order and restrain defendants from selling the plaintiffs' stock illegally acquired and about to be illegally disposed of and that a permanent injunction issue out of and under the seal of this court, against the defendants, their agents, assistants, deputies and employees, and all persons acting or assuming to act under their direction, restraining and enjoining them forever from selling, offering to sell, disposing or offering to dispose of plaintiffs' stock and that said defend-
13 ants be directed and ordered by this court to return the plaintiffs' stock, now in the unlawful possession and custody of the defendants, to the plaintiffs, the lawful owners.

4. That plaintiffs have such other and further relief as the nature of the case may require and to the court may seem just and proper in the premises.

Clinton M. Hester,
CLINTON M. HESTER,
432 Shoreham Building,
Washington, D. C.,
Attorney for Plaintiffs.

[*Duly sworn to by J. Stanley Dollar; jurat omitted in printing.*]

14 *Exhibit A*

ORIGINAL CONTRACT BETWEEN PLAINTIFFS AND THE UNITED STATES MARITIME COMMISSION DATED AUGUST 15, 1938

This agreement dated August 15, 1938, by and between:

Dollar Steamship Lines, Inc., Ltd., a Delaware corporation, hereinafter referred to as Dollar of Delaware;

Dollar Steamship Line, a California corporation, hereinafter referred to as Dollar of California;

The Robert Dollar Co., a California corporation, hereinafter referred to as Robert Dollar Co.;

Admiral Oriental Line, a Washington corporation, hereinafter referred to as Admiral Oriental;

Pacific Lighterage Corporation, a Marine corporation;

Olympic Refining Company, a Washington corporation;

Dollar Wharf & Warehouse Company, a China Trade Act corporation;

Dollar Terminal Steamship Company, a Nevada corporation;

R. Stanley Dollar;

Keith R. Ferguson and Robert Dollar II, as executors of the estate of John Harold Dollar, also known as J. Harold Dollar, deceased;

H. M. Lorber;

The Anglo California National Bank of San Francisco, a national-bank corporation, hereinafter referred to as Anglo Bank;

Mortimer Fleishhacker;

Herbert Fleishhacker; and

United States Maritime Commission, hereinafter referred to as the Commission;

Witnesseth: The parties hereto are interested, directly and indirectly, financially and otherwise, in Dollar of Delaware, and deem the consummation of the Adjustment Plan respecting said company as hereinafter set forth to be mutually advantageous. Therefore, the parties hereto hereby adopt said Adjustment Plan, and agree that it shall be deemed to constitute, and shall constitute, an agreement by and between them, and in consideration of the agreements, covenants, commitments, undertakings, representations, and warranties therein set forth, and in consideration of the granting by the Commission of the five-year operating differential subsidy and the loan for repairs, rehabilitations and reconditioning therein referred to, subject expressly to the provisions of paragraph 23 of said Adjustment Plan, each of the parties hereto hereby respectively agree, with all reasonable dispatch, to do all of the things and take all the steps, acts, and proceedings, and execute and deliver all certificates, documents, instruments, and writings that it may legally do, take, or execute and deliver and that may be necessary or proper on its or his part to accomplish or facilitate the consummation of the transactions and deeds referred to and set forth in said Adjustment Plan. Said Adjustment Plan is as follows:

15. ADJUSTMENT PLAN—DOLLAR STEAMSHIP LINES, INC., LTD.

1. Dollar of California holds, or forthwith will acquire and hold, all of the issued and outstanding class B stock of Dollar of Delaware, which said stock consists of 2,100,000 shares and stands of record in the names of the respective parties hereinafter listed, and Dollar of California will transfer, or cause to be transferred, all of said stock to the Commission, or its nominee, free and clear of all liens and incumbrances:

	Shares
(a) Dollar of California	1,872,210
(b) Robert Dollar Co	227,790
Total	2,100,000

2. The following named parties hold, or forthwith will acquire and hold, the number of shares of Class A stock of Dollar of Delaware listed after their respective names, and each of said parties will respectively transfer, or cause to be transferred, to the Commission, or its nominee, free and clear of all liens and incumbrances, the respective number of shares so listed:

	Shares
(a) J. Harold Dollar estate	24,107
(b) R. Stanley Dollar	2,283
(c) H. M. Lorber	9,174
(d) Mortimer Fleishhacker	26,122
(e) Dollar of California	2,075
(f) Admiral Oriental	122
Total	63,893

3. All rights and interests of the pledgor in and to the following listed class A stock of Dollar of Delaware will be transferred to the Commission, or its nominee, subject to existing pledges, and during the existence of said pledges, the Commission, or its nominee, shall have the voting rights accruing to such stock and the pledgor and pledgees will duly execute and deliver to the Commission or its nominee, from time to time, whenever requested, irrevocable proxies, giving full, unrestricted and unlimited rights to vote all such stock:

	Shares
Herbert Fleishhacker	33,000

4. All rights and interests of the respective pledgor in and to the following issued class A stock of Dollar of Delaware will be transferred to the Commission, or its nominee, subject to existing pledges and subject to option agreements referred to in paragraph 5 hereof:

	Shares
(a) R. Stanley Dollar	33,600
(b) J. Harold Dollar estate	11,273
(c) R. Stanley Dollar, J. Harold Dollar estate, and Herbert Fleishhacker, jointly	6,660
Total	71,533

5. The Anglo Bank as pledgee and the respective pledgors of the class A stock referred to in paragraph 4 above, will execute and deliver option agreements respecting such stock which shall provide:

(a) For a period of five years from date, the Commission, or its nominee, shall have all voting rights accruing to the pledged A stock, and during such period no disposition shall be made of any such stock (other than by release to the Commission, or its nominee) except subject to the express right of the Commission to exercise all voting rights thereon, and during such period the pledgee, pledgors, and other holders of said stock will duly execute and deliver to the Commission, or its nominee, from time to

time, wherever requested, irrevocable proxies, giving full, unrestricted, and unlimited rights to vote all such stock.

(b) For a period of five years from date, the Commission, or its nominee, shall have the right, at any time, to purchase
16 and take over all rights and interests of the pledgee (including the rights and interests of the pledgee in and to all collateral then pledged) upon payment of a sum equal to the balance due on account of the loan for which the A stock is so pledged, and in such event to release said A stock from the pledge, and transfer said A stock to the Commission, or its nominee, free and clear.

(c) During the period terminating five years from date, the pledged A stock shall be released and transferred to the Commission, or its nominee, free and clear, upon receipt by the pledgee of payments on account of the loan equal in the aggregate to $2 for each share of such A stock so pledged, from any source or sources, except only from the proceeds realized from the liquidation of pledged collateral other than such A stock (including but not limited to any payments that may be made by the pledgor; or that may be made by the Commission, or its nominee, or their respective assignees); and during such period no disposition shall be made of any such stock (other than by release to the Commission, or its nominee) except subject to the express right of the Commission, or its nominee, to receive such stock free and clear when the aggregate of such payments on account of the loan equals $2 for each such share.

(d) For a period of five years from date, unless the A stock included in the pledge has been released and transferred to the Commission, or its nominee, free and clear, no other collateral securing the pledge shall be released from the pledge, except for full consideration (the determination of the loan committee of the pledgee in this regard to be conclusive) and no guarantee shall be released; and the Commission, or its nominee, shall have the right to full information respecting such pledge and all transactions affecting the same.

(e) A legend shall be stamped upon all certificates evidencing the stock covered by said option agreements, making appropriate reference to said agreements and to the transfer of rights and interests in and to said stock in accordance with paragraph 4 of this Adjustment Plan.

6. Dollar of Delaware will make cash payments to such of the parties hereto as may incur expense for stock transfer taxes in connection with the transfers above referred to, which payments shall equal the respective amounts of such expenses so incurred.

7. The management agreement between Dollar of California and Robert Dollar Co., dated June 22, 1926 (to which Dollar

of Delaware is the assignee of Dollar of California) will be terminated and cancelled by said parties. The matter of the adjustment or settlement of any rights and claims in connection with said contract as between Dollar of California and Robert Dollar Co. shall be handled by said companies by separate agreement on such basis as may be agreed to by and between them, but no obligations or liability shall be imposed upon or result or accrue to Dollar of Delaware or any of the other parties hereto by reason of such termination and cancellation.

8. Dollar of Delaware will take over and assume all leases of Robert Dollar Co. for offices, space, and premises acquired by Robert Dollar Co. and used by it in the performance of its activities as managing agent under and pursuant to said management agreement of June 23, 1926, exclusive of the office at Manila, P. I., in such manner that Dollar of Delaware shall assume no obligation to any landlord which shall be more extensive than the existing obligation of Robert Dollar Co. and so as to preserve and vest in Dollar of Delaware all rights, if any exist, against any landlord by reason of said leases. Dollar of Delaware will hold Robert Dollar Co. harmless by reason of any liability or obligations that it has or may have by reason of said leases which arose or may arise subsequent to January 25, 1938. For a period of six months from date Dollar of Delaware shall have the right but shall have no obligation to use and occupy the space in said premises at Manila, P. I., at the same rental which it has been paying therefore since January 25, 1938.

9. Dollar of California will acquire from Robert Dollar Co. clear and unincumbered title to all office furniture, furnishings, fixtures, and equipment now situate in the offices and prem-
17 ises referred to in paragraph 8 hereof, including said office at Manila, P. I., and also all other such property (if there should be any) which Robert Dollar Co. acquired for the purpose of handling its activities as said managing agent and which it now owns and holds, and also all automobiles so acquired, owned and held (including, but without limitation, the Chrysler automobile used by Robert Dollar in San Francisco), and Dollar of California will sell all said property to Dollar of Delaware, and Dollar of Delaware will purchase all of said property from Dollar of California, for the sum of $100,000, payable $35,000 in cash, and $65,000 in preferred stock of Dollar of Delaware at the par value thereof.

10. Dollar of Delaware will take into its employ all of the personnel of Robert Dollar Co. engaged in managing agent's activities. Robert Dollar Co. represents and warrants that it has no contracts of employment with any of said employees, nor has it any undischarged obligations or liabilities to any of said employees

which said employees were legally entitled to have had discharged on or prior to January 25, 1938, notwithstanding their employment continued after said date. Dollar of Delaware shall have no obligation to retain any of said employees, and shall have no obligations or liability to any of said employees in the event it hereafter should terminate their employment, except only such obligations and liability as may be imposed by law.

11. If Robert Dollar Co. obtains a modification of its existing lease for space in the Robert Dollar Building, San Francisco, between Robert Dollar Co. and the owners of said building, dated April 1, 1937, so as to include therein, without additional rental, the 3,460 square feet of space in the basement of said building which is being used for storage purposes, and so as to provide, at the expense of the owners of said building, for such changes in partitions and in the arrangement of the elevator court as Dollar of Delaware may desire, Dollar of Delaware will affirm and assume such lease, and such lease shall be duly approved by the Commission.

12. Dollar of Delaware, within six months from the date of this agreement, will relinquish all rights to the use of the name "Dollar," and all rights to use the Dollar flag and insignia. During such six-month period, unless said rights are earlier so relinquished. Dollar of Delaware will continue to have the right to use said name, flag, and insignia.

13. Dollar of California, Admiral Oriental, Pacific Lighterage Corporation, Robert Dollar Co., and Olympic Refining Co. will give such confirmations, receipts, releases, and agreements as may be deemed necessary or proper to foreclose any attack on transactions that have been had in connection with the debt adjustments referred to in the compilation entitled "Financial Readjustments in Dollar Steamship Lines, Inc., Ltd." and issued by the Commission under date of February 17, 1938, pages 22 to 25, inclusive.

14. The Commission and Dollar of Delaware will release R. Stanley Dollar and Dollar of California from all liability as makers, comakers, guarantors, or endorsers of the ship mortgage notes covering the steamships President Harrison, Hayes, Adams, Garfield, Polk, Monroe, Van Buren, Taft, Cleveland, Wilson, Lincoln, and Pierce in such manner as to preserve and protect the liability of Dollar of Delaware on said ship mortgages and the priorities of said mortgages, and Dollar of Delaware will do and take all action and proceedings and authorize, execute, and deliver all instruments and writings that may be necessary to accomplish such result or that the Commission may deem advisable for such purpose, and agrees that said releases shall not release or in any way impair its obligations under said notes or said mortgages securing the same, nor shall any credits be allowed or given thereon,

either as to principal or interest, by reason of the stock transfers or other consideration that may be received by the Commission under the terms and provisions hereof. The Commission and Dollar of Delaware will deliver to R. Stanley Dollar and Dollar of California such instruments as may be necessary or proper to evidence said releases. Appropriate endorsements to evidence said releases shall be made upon each of said ship mortgage notes on which R. Stanley Dollar and Dollar of California, or either of them, are makers, comakers, or endorsers, and said notes shall be deposited in escrow with instructions to the escrow holder to make the same available for inspection, upon directions of the Commission, or R. Stanley Dollar, or Dollar of California, to any parties, court, commissions, or other groups or bodies designated in such directions.

18 15. Dollar of Delaware will hold Robert Dollar Co., Dollar of California, Admiral Oriental, and their respective officers and directors, harmless from all liability that has or may hereafter accrue under that certain contract dated April 23, 1930, by and between Robert Dollar Co., Dollar of California, Admiral Oriental, and Dollar of Delaware, as parties of the first part and collectively referred to in said agreement as the Dollar companies, and Matson Navigation Company, Matson Navigation Corporation, Ltd., and Oceanic Steamship Company, as parties of the second part and collectively referred to in said agreement as the Matson companies, by reason of any actions on the part of Dollar of Delaware which have created or may hereafter create any liability of said Matson companies for which said Dollar companies, or their respective officers or directors, may be held accountable.

16. Dollar of Delaware will hold R. Stanley Dollar, personally and as an officer and director of Dollar of Delaware, harmless by reason of his personal guarantee of February 20, 1934, to London Steamship Owners' Mutual Insurance Association, Ltd., and will make application to said association to release R. Stanley Dollar from said guarantee, and if it should be necessary to accomplish such result Dollar of Delaware will undertake to obtain a surety company guarantee as a substitute for said personal guarantee of R. Stanley Dollar and if it should be able to obtain such substituted guarantee it will do so and thereby effect such substitution. If Dollar of Delaware should be unable to obtain such release within 90 days from the date hereof, R. Stanley Dollar thereafter shall have the right to give notice to said association that he withdraws all said personal guarantees.

17. Dollar of Delaware and R. Stanley Dollar, and Dollar of Delaware and H. M. Lorber, will give mutual releases of and from all claims based upon past transactions.

18. The Commission, the Anglo Bank, Dollar of California, Dollar Wharf & Warehouse Co., and Dollar of Delaware will take all action and proceedings necessary or proper to effect an extension of their outstanding Fillmore-Johnson mortgages for a period of one year, without amortization, and so as to provide that the rights of the mortgagees shall be limited to the collateral.

19. The Anglo Bank, Dollar Terminal Steamship Company and the Commission will take all action and proceedings and give all consents that may be necessary or proper to effect the cancellation of the indebtedness of Dollar of Delaware to Dollar Terminal Steamship Company. (See Compilation, p. 23 (c).)

20. The Anglo Bank and Dollar of Delaware will modify the agreement between them dated January 17, 1938, so as to provide that each of the dates in the amortization schedule set forth in paragraph 1 of said agreement be set forward six months.

21. Dollar of Delaware will take all steps and proceedings and will duly authorize, execute and deliver all formal applications that may be required by the Commission and by the Reconstruction Finance Corporation, and all mortgages, promissory notes, and other writings and instruments that may be necessary or proper to—

(a) Obtain a five-year operating differential subsidy from the Commission;

(b) Obtain a loan of approximately $1,500,000 from the Commission for the purpose of meeting the expense of repairing, rehabilitating, and reconditioning its vessels;

(c) Obtain a loan of not less than $2,000,000 from the Reconstruction Finance Corporation for operating capital; and

(d) Meet and comply with all requirements of the Commission and the Reconstruction Finance Corporation, as to security or otherwise, which may be imposed as conditions to granting said subsidy and said loan or loans.

19 22. The class A and class B stock to be transferred to the Commission, or its nominee, free and clear or subject to existing pledges, the option agreements relating to the class A stock to be transferred subject to existing pledges, and the instruments and writings necessary or proper to accomplish the objectives and results set forth in paragraphs 1 to 20, inclusive, shall forthwith be deposited in escrow and the same shall be delivered to the respective parties entitled thereto when and if the subsidy agreement referred to in paragraph 21 above has been entered into and the loans so referred to have been made, or firm commitments therefor have been obtained. In the event said subsidy agreement has not been entered into and said loans have not been made or firm commitments for said loans have not been obtained within sixty

days from the date hereof, each of the parties hereto shall have the right to demand and receive the return of all stock certificates, option agreements, and other instruments and writings which said parties have respectively so deposited in escrow, and in the event of any such withdrawal or withdrawals; the respective obligations of the parties hereto based or founded upon the terms and provisions of this agreement shall thereupon cease and terminate. Dollar of Delaware shall pay all escrow fees that may be incurred in connection with the above transactions.

23. It is expressly understood and agreed by and between the parties hereto that the Commission has and shall have no duties or obligations whatever to any of the other parties hereto except only such duties and obligations as it herein expressly assumes and agrees to meet and perform and such duties and obligations as it may expressly agree to meet and perform in said subsidy agreement and in any agreement it may enter into in respect of said loan for repairs, rehabilitation and reconditioning, and in this connection it is hereby expressly understood and agreed—

(a) That the Commission has not undertaken or agreed, and does not undertake or agree hereby, to enter into said subsidy agreement unless and until the findings and determinations required by law with respect to such subsidy agreement have been made by the Commission, and terms and conditions respecting such subsidy agreement have been arrived at by the Commission and the party or parties to the subsidy agreement;

(b) That the Commission has not undertaken or agreed, and does not undertake or agree hereby, to enter into any agreement with respect to a loan for repairs, rehabilitation, and reconditioning unless and until any findings and determinations required by law in connection with such loans shall have been made by the Commission, and the Commission and the parties to the loan have arrived at satisfactory terms and conditions;

(c) That the Commission has not undertaken or agreed, and does not undertake or agree hereby, to take any action with reference to the proposed loan of not less than two million dollars from the Reconstruction Finance Corporation for operating capital unless and until any findings and determinations required by law with respect to the subordination of any indebtedness to the Commission to the mortgage or mortgages securing said loan from the Reconstruction Finance Corporation have been made by the Commission, and that the only obligations of the Commission are to furnish the Reconstruction Finance Corporation such information concerning Dollar of Delaware as may be requested by the

Reconstruction Finance Corporation and in the possession of the Commission, and subject to the findings and determinations aforesaid and if the conditions of the loan are satisfactory to the Commission, to subordinate the existing indebtedness on the operating fleet of Dollar of Delaware which is owed to the Commission to the mortgage or mortgages securing said loan from the Reconstruction Finance Corporation;

(d) That the Commission shall have no duty or obligation to make any payments, loans, or advances whatever to Dollar of Delaware or to any creditor of said company or otherwise except only in such amounts and under such terms and conditions as may be expressly provided in said subsidy and loan agreements, nor shall it have any duty or obligation whatever to continue, or to provide for the continuation of the operations, or any part of the operations, of Dollar of Delaware except as may in said agreements be expressly provided, nor shall it have any duty or obligation to continue to hold any of the stock, or any interest in or to any of the stock, of Dollar of Delaware which it may acquire under the terms and provisions hereof or otherwise; and

(e) That the sole right of any party hereto under this agreement in the event a subsidy agreement is not entered into or the loans mentioned are not made or firm commitments therefor obtained shall be to terminate this agreement in accordance with paragraph 22 hereof.

In witness whereof, the individual parties, and Keith R. Ferguson, and Robert Dollar II, as executors of the estate of John Harold Dollar, also known as J. Harold Dollar, deceased, have executed fifteen counterpart originals of this agreement by affixing their respective signatures thereto (such execution of this agreement by said executors being subject to such confirmation by the court in said estate proceedings as may be required by law), and the other parties have caused such counterparts to be executed by their respective duly authorized officers or representatives.

DOLLAR STEAMSHIP LINES, INC., LTD.,
[SEAL] By ARTHUR B. FOOLE, *Vice President.*
Attest:
D. T. BUCKLEY, *Secretary.*

DOLLAR STEAMSHIP LINE,
[SEAL] By M. THOMPSON, *2d Vice President.*
Attest:
A. E. LANG, *Assistant Secretary.*

THE ROBERT DOLLAR CO.,
[SEAL] By H. M. LORBER, *Vice President.*

Attest:
ROBERT P. SEELEY, *Assistant Secretary.*
ADMIRAL ORIENTAL LINE,
[SEAL] By ROBERT DOLLAR II, *Vice President.*
Attest:
E. H. HALL, *Secretary.*
PACIFIC LIGHTERAGE CORPORATION,
[SEAL] By R. H. ANDERSON, *President.*
Attest:
L. C. ROSS, *Assistant Secretary.*
OLYMPIC REFINING COMPANY,
[SEAL] By PHILIP E. JOHNSON, *Vice President.*
Attest:
K. BRENDEL, *Secretary.*
DOLLAR WHARF & WAREHOUSE COMPANY,
[SEAL] By O. G. STEEN, *President.*
Attest:
J. A. TOGNETTI, *Assistant Secretary.*
DOLLAR TERMINAL STEAMSHIP COMPANY,
[SEAL] By H. M. LORBER, *Vice President.*
Attest:
E. C. KESTER, *Assistant Secretary.*

21 (Sgd.) R. Stanley Dollar,
R. STANLEY DOLLAR,
(Sgd.) Keith R. Ferguson,
KEITH R. FERGUSON,
(Sgd.) Robert Dollar, II,
ROBERT DOLLAR, II,
as Executors of the Estate of John Harold Dollar, also known as J. Harold Dollar, deceased.
(Sgd.) H. M. Lorber,
H. M. LORBER,
THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,
[SEAL] By P. E. HOOVER, *Vice President.*
Attest:
R. H. HOLMBERG, *Assistant Secretary.*
(Sgd.) Mortimer Fleishhacker,
MORTIMER FLEISHHACKER.
HERBERT FLEISHHACKER.
UNITED STATES MARITIME COMMISSION,
By REGINALD S. LAUGHLIN,
Special Counsel.

22 *Exhibit B*

SUPPLEMENTAL CONTRACT BETWEEN PLAINTIFFS AND THE UNITED STATES MARITIME COMMISSION DATED AUGUST 29, 1938

This agreement dated August 29, 1938, by and between Dollar Steamship Lines, Inc., Ltd., a Delaware corporation; Dollar Steamship Line, a California corporation; the Robert Dollar Co., a California corporation; Admiral Oriental Line, a Washington corporation, Pacific Lighterage Corporation, a Maine corporation; Olympic Refining Company, a Washington corporation; Dollar Wharf & Warehouse Company, a China Trade Act corporation; Dollar Terminal Steamship Company, a Nevada corporation; R. Stanley Dollar; Keith R. Ferguson, and Robert Dollar II, as executors of the estate of John Harold Dollar, also known as J. Harold Dollar, deceased; H. M. Lorber; the Anglo California National Bank of San Francisco, a national bank corporation; Mortimer Fleishhacker; and United States Maritime Commission, witnesseth:

Whereas each of the parties hereto previously has duly executed a certain "Agreement Respecting Adjustment Plan of Dollar Steamship Lines, Inc., Ltd.," dated August 15th, 1938; and

Whereas said agreement, so executed, includes as a party thereto each of the parties hereto and also includes Herbert Fleishhacker, and said Herbert Fleishhacker has declined to sign and enter into said agreement; and

Whereas the parties hereto each are willing and desire that said agreement become effective notwithstanding said action of said Herbert Fleishhacker,

Now, therefore, the parties hereto, in consideration of the premises and the mutual agreements and covenants herein contained and other good and valuable consideration, hereby agree as follows:

1. Each of the parties hereto hereby agree that said "Agreement Respecting Adjustment Plan of Dollar Steamship Lines, Inc., Ltd." so heretofore executed by them, be and the same hereby is made effective and binding upon them and each of them notwithstanding the fact that said Agreement has not been executed by said Herbert Fleishhacker.

2. Except only for the omission of said Herbert Fleishhacker as a party to said agreement; and the elimination therefrom of all agreements, convenants, commitments, undertakings, representations, and warranties of said Herbert Fleishhacker therein set forth, said agreement hereby is in all respects ratified and affirmed.

In witness whereof the individual parties, and Keith R. Ferguson and Robert Dollar II, as executors of the estate of John Harold Dollar, also known as J. Harold Dollar, deceased, have executed

fourteen counterparts of this agreement by affixing their respective signatures thereto (such execution of this agreement by said executors being subject to such confirmation by the court in said estate proceedings as may be required by law), and the other parties have caused such counterparts to be executed by their respective duly authorized officers or representatives.

DOLLAR STEAMSHIP LINES, INC., LTD.,
[SEAL] By ARTHUR B. POOLE, *Vice President.*
Attest:

DOLLAR STEAMSHIP LINE,
D. T. BUCKLEY, *Secretary.*
[SEAL] By M. THOMPSON, *Second Vice President.*
Attest:

A. E. LANG, *Assistant Secretary.*

23 THE ROBERT DOLLAR CO.
[SEAL] By H. M. LORBER, *President.*
Attest:
ROBERT P. SEELEY, *Assistant Secretary.*
ADMIRAL ORIENTAL LINE,
[SEAL] By ROBERT DOLLAR II, *Vice President.*
Attest:
E. H. HALL, *Secretary.*
PACIFIC LIGHTERAGE CORPORATION,
[SEAL] By R. H. ANDERSON, *President.*
Attest:
L. C. ROSS, *Secretary.*
OLYMPIC REFINING COMPANY,
[SEAL] By PHILIP E. JOHNSON, *Vice President.*
Attest:
K. BRENDEL, *Assistant Secretary.*
DOLLAR WHARF & WAREHOUSE COMPANY,
[SEAL] By O. G. STEEN, *President.*
Attest:
J. A. TOGNETTI, *Assistant Secretary.*
DOLLAR TERMINAL STEAMSHIP COMPANY,
[SEAL] By H. M. LORBER, *Vice President.*
Attest:
E. C. KESTER, *Secretary.*

R. Stanley Dollar,
R. STANLEY.
Keith R. Ferguson,
KEITH R. FERGUSON.
Robert Dollar II,
ROBERT DOLLAR II.

As Executors of the Estate of John Harold Dollar, also known as J. Harold Dollar, deceased.

H. M. Lorber,
H. M. Lorber.
The Anglo California National
Bank of San Francisco,
[seal] By P. E. Hoover, *Vice President.*
Attest:
R. H. Holmberg, *Assistant Secretary.*
Mortimer Fleishhacker,
Mortimer Fleishhacker.
United States Maritime Commission,
By Reginald S. Laughlin, *Special Counsel.*

In the District Court of the United States for the District of Columbia

24 In the District Court of the United States for the District of Columbia

Civil Action No. 31468

In the Matter of R. Stanley Dollar (an individual), et al.

vs.

Emory S. Land (Chairman, United States Maritime Commission), et al.

Affidavit

Filed Nov. 15, 1945

City of Washington,
District of Columbia, ss:

Emory S. Land, being first duly sworn, deposes and says:

1. That he is Chairman of the United States Maritime Commission, having become a member of said Commission on April 16, 1937, having become Chairman thereof on February 18, 1938, and having served continuously in said capacity since the latter date. That in his capacity as member and Chairman of the Commission he has personal and official knowledge of the facts herein stated, except facts stated upon information and belief, and as to facts so stated, he verily believes them to be true.

2. That the other four defendants in this case are members of the United States Maritime Commission, having served continu-

ously in said capacity since, but not before, the dates set opposite their names:

Howard L. Vickery, September 26, 1940.
Edward Macauley, April 3, 1941.
John M. Carmody, December 13, 1941.
Raymond S. McKeough, October 16, 1945.

3. That all acts of defendants and their predecessors in office set out in the complaint in this case, and all acts taken pursuant to their direction or supervision, to the extent that said acts were actually performed, were done and performed by defendants and their predecessors in office, or pursuant to their direction or supervision, pursuant to the official duties of defendants and their predecessors in office, as members of the Maritime Commission, in the administration of the Merchant Marine Act, 1936.

4. That the history, background, and details of transactions and negotiations pertinent to this controversy are fully set out in two comprehensive reports made by the Maritime Commission to Congress, entitled: "Financial Readjustment in Dollar Steamship Lines Inc., Ltd. and Documents Executed in connection therewith, which resulted in the granting of Operating-Differential Subsidies to Dollar Steamship Lines Inc., Ltd., and American Mail Line, Ltd." and "Reorganization of American President Lines, Ltd. (Formerly Dollar Steamship Lines Inc., Ltd." (dated February 17, 1938, and April 10, 1939, respectively, copies of which are attached hereto and marked Exhibits "A-1" and "A-2", respectively. Affiant verily believes that all statements of fact therein set out, to the extent that said statements are made by the Maritime Commission, its members, officers, and employees are true and correct.

5. That a concise statement of the facts leading up to and underlying the transactions here involved is as follows:

(a) In 1937 the Maritime Commission found that, in order to further the development and maintenance of an adequate and well-balanced merchant marine, to promote the commerce of the United States, and to aid in the national defense, it was essential to maintain, develop and improve the steamship service over routes then and formerly operated by Dollar Steamship Lines Inc., Ltd., such service then being the only American-flag merchant shipping service from the Pacific Coast of the United States to the Far East, and said service being at that time operated by a corporation (Dollar Steamship Lines Inc., Ltd.) standing and having stood for a long period of time upon the brink of bankruptcy, and then, in the Commission's judgment, being operated inefficiently and in a manner detrimental to the interest of the United States of America.

(b) Dollar Steamship Line (hereinafter called "Dollar of California"), the assets of which were transferred to Dollar Steamship Lines Inc., Ltd. (hereinafter called "Dollar of Delaware") in August 1929, and which for some years prior to 1924 had operated nonscheduled freight steamship service, began in 1924 to operate a round-the-world service with vessels purchased from the United States Shipping Board. These vessels had been constructed by the Shipping Board at a cost exceeding $29,000,000, had a world-market value in excess of $7,000,000, and were sold for $3,850,000, no part of which was paid in cash.

(c) Dollar of California in 1925 purchased from the Shipping Board five additional vessels, construction cost of which was approximately $32,500,000, which had a world-market value of $8,460,000, and which were sold for $5,625,000, of which $140,625 was paid in cash.

(d) In 1931 Dollar of Delaware became financially embarrassed and sought and received extensions of ship sales notes, and on December 31, 1932, past-due indebtedness to the Government amounted to $674,642.50. By April 1933, further payments then due were not made, and well-grounded insistence by the Comptroller General that steps be taken to protect the Government's interest resulted in the creation of a so-called "joint account", which proved ineffective, and, notwithstanding which, by May 1935, past-due indebtedness to the Government amounted to $2,328,530.16.

(e) When in April 1937 the Maritime Commission began to take active steps looking to the preservation of this steamship service, Dollar of Delaware owed the Government more than $15,000,000, and had long been in default amounting to more than $3,000,000. It was without sufficient net income or current assets to meet amortization requirements, was indebted to creditors other than the Government in an amount exceeding
27 $2,500,000, a substantial portion of which indebtedness was past due. Defaults on its obligations to the Government, both as to principal and interest, were increasing steadily. Vessel maintenance had been neglected to the point where many ships did not comply with legal and practical requirements for safety at sea, and sailings were made only with the greatest difficulty. Bankruptcy proceedings had been under consideration by the Government for more than a year and also before the creation of the Maritime Commission, and in early 1937 were also under consideration by the company itself. Bankruptcy proceedings would have seriously interrupted and impaired steamship service to the detriment of the commercial and military welfare of the United States, would have resulted in serious losses

to trade creditors, considerable unemployment, and little, if any, realization by stockholders.

(f) Faced by this situation, the Maritime Commission was also faced by the fact that it was without power to grant an operating subsidy, unless it determined, among other things, that the company possessed financial resources necessary to conduct the proposed shipping operations, and that the Commission was legally compelled to withhold payments of any amounts due under contract providing for such subsidy while the contractor was in default on construction loans, ship sales mortgage notes, or other obligations due the United States.

(g) The situation, summed up, was that the national interest required that service be preserved; it could be preserved only by means of operating subsidy, and the Commission could neither grant such subsidy nor pay such subsidy if granted unless the company were financially rehabilitated and its management enormously improved.

(h) In order to solve the problem presented, the Commission worked out, and there was consummated on January 25, 1938, a partial rehabilitation which the Commission rightly regarded as an important forward step in working out the preservation of the essential steamship service involved, and enabling the Commission to support it by adequate and essential, but temporary, subsidy. Accomplishments as of this date included, among other things, the following:

(1) The adjustment of over $1,500,000 in trade debt on the general basis of 20 per cent cash, 20 per cent long-term debentures, and 60 per cent preferred stock.

(2) The capitalization of over $1,000,000 of bank debt and the extension of the balance of $1,800,000 over a period of 10 years.

(3) The capitalization in toto of almost $2,000,000 of intercompany debt.

(4) The consummation of arrangements making available to Dollar of Delaware all the shipping personnel and assets of the Robert Dollar Company at cost.

(5) The termination without cost to the Government of a suit filed by Dollar of Delaware against the United States for almost $6,000,000 based upon termination of the mail contract.

(6) The reconstitution of the board of directors whereby directors were elected who would safeguard and advance the interest which the Commission, the company's creditors, and the public had in the maintenance of the services.

(7) The grant to Dollar of Delaware of a six months' operating-differential subsidy. The amounts payable under this subsidy were found by the Commission in the exercise of its discretion to

be the maximum amounts then payable under the requirements of sec. 603 (b) of the Merchant Marine Act, 1936, and were based upon expert estimates by the Commission's Division of Research, made in the light of data in the possession of the Commission on American and foreign operating costs in the trade served by the subsidized vessels.

(i) The Commission recognized that its accomplishments as of January 25, 1938, constituted only the first step in working out the problem. It continued to explore methods of preserving and improving the steamship service, and as an aid thereto the readjustment upward of amounts payable as operating subsidy to the maximum legally permissible. By March 1938, the Commission knew that the company, which on October 31, 1937, had total current assets of $1,505,000 and total current liabilities of $6,560,000, then presented an even less favorable financial picture, as on February 28, 1938, a balance sheet, prepared under the direction of Commission representatives in California, showed that the company had $310,000 in cash or equivalent and total available funds aggregating $770,000; that the company was faced with the necessity of reserving $260,000 to make agreed payments to trade creditors, and of providing prompt payment of $508,000 of trade debt not covered by agreements. The company's credit facilities had been restricted or withdrawn. Prepayments of freight and passenger money had decreased heavily, and a large amount of working capital was required in order to prevent complete cessation of the steamship service.

(j) On April 28, 1938, the Commission advised R. Stanley Dollar of its willingness to enter into a transaction which, among other things, contemplated grant of a five-year operating differential subsidy, guarantees of then-existing indebtedness of Dollar of Delaware to the Commission by R. Stanley Dollar and various enterprises, these guarantees to be secured by pledge of all of R. Stanley Dollar's holdings in Dollar of Delaware, all stock of Dollar of Delaware held by Dollar of California, and all of the Robert Dollar Company's holdings of Dollar of Delaware stock.

(k) This proposal was somewhat modified, but the requirement for the pledge of stock was unchanged, and Dollar of Delaware, on June 17, 1938, by letter, a copy of which, together with enclosures, is hereto attached and marked Exhibit "B", declared its inability to secure the guarantees and pledges, and in effect rejected the Commission's proposal, but by enclosing a copy of a letter from Dollar of California, dated June 16, 1938, raised the possibility that the Commission might acquire 2,100,000 shares of B stock of Dollar of Delaware, provided that Dollar of

Delaware would assume certain leases, change the name of the company, cease to use the house flag and trade insignia, and that all ship sales notes and mortgages securing the same were cancelled and new notes and mortgages given by Dollar of Delaware direct, this provision being of special benefit to Dollar of California. On June 20, 1938, however, the Commission was advised by its special counsel in San Francisco of the possibility that the Dollar interests would agree to transfer title to all Class B stock and certain Class A stock of Dollar of Delaware to the Commission, and on June 21, 1938, the Commission authorized negotiation for the acquisition of this stock. These negotiations culminated in a contract between plaintiffs (and others) and the Commission, dated August 15, 1938, a copy of which is hereto attached and marked Exhibit "C".

(1) In considering the action to be taken, the Commission considered the advice of its General Counsel that if the Commission, after considering all the facts, found that the acquisition of the stock was a necessary incident to and part of the consideration for the carrying out of the proposed plan, or that such acquisition was necessary to protect, preserve, or improve the Commission's creditor position, the Commission might legally acquire the stock, and as a further incident to the transaction, release R. Stanley Dollar and Dollar Steamship Line from their obligations as comakers or guarantors of the mortgage notes held by the Commission, all the facts, including those heretofore set out, and, in particular, the following: The Commission was then advised that Dollar of Delaware, which had for a period of years faced the inability of meeting its obligations as they accrued, including obligations to
31 the United States, owed its unsecured creditors approximately $3,485,000; that it had available in current assets $733,000; and that on a liquidation basis, the company's creditors would have received, at most, 60 cents on the dollar, and might very well have received much less; that the only alternative was reorganization in bankruptcy proceedings, which would result in no trade creditors being paid, no repair men being paid, no realization by stockholders, approximately 2,500 employees being thrown out of work, at least temporarily, possible bankruptcy of creditors, a loss in purchasing power on the West Coast of about $10,000,000 per annum; and that although the Commission had prior thereto considered granting a temporary subsidy if certain arrangements could be completed, which contemplated only that the Commission would hold stock of Dollar of Delaware as security, it had by now, after continued consideration of the management record of Dollar of Delaware, come to the conclusion that it was essential for the

Commission to acquire full and unrestricted title to the stock in order that R. Stanley Dollar and his associates should not have power to resume managerial functions with respect to Dollar of Delaware, in view of the Commission's opinion of the effect of such resumption upon the future of the steamship service and its eligibility for subsidy under the Merchant Marine Act, 1936.

(m) It was the opinion of the Commission that the failure of Dollar of Delaware to maintain and keep ships in seaworthy condition as required by law, and to maintain regular sailings at a time when the Army and Navy were increasing their shipments to the Philippine Islands, in particular, and the South Pacific, in general, had then deteriorated the service to such an extent that commercial shippers were being compelled to divert their cargo to foreign lines, and that reorganization proceedings under the National Bankruptcy Act, which appeared the only alternative to the execution and performance of the contract of August 15, 1938, would have been detrimental to the interest of the United States and would have enormously benefited foreign steamship operators in the field, who were predominately Japanese.

32 (n) So finding, and finding that acquisition of title to the stock referred to in the agreement of August 15, 1938, by the United States of America was a necessary incident to and part of the consideration for the carrying out of the proposed plan, which would permit a grant of subsidy under the Merchant Marine Act, 1936, and that such acquisition was necessary to protect, preserve, and improve the Commission's creditor position, and in order to keep alive the only American-flag merchant shipping service from the Pacific Coast of the United States to the Far East, and further the development and maintenance of an adequate and well-balanced merchant marine, to promote the commerce of the United States, and to aid in the national defense, the Commission authorized signature and performance of the agreement of August 15, 1938, and the acquisition of the stock.

6. That subsequent to the action of the Commission referred to above, the contract of August 15, 1938, was fully performed; and that prior to performing irrevocably its obligations thereunder, the Commission secured from Keith R. Ferguson, counsel for R. Stanley Dollar, Dollar of California, H. M. Lorber, and the Estate of J. Harold Dollar, deceased, an opinion, a true copy of which is hereto attached and marked Exhibit "D", which opinion in brief advises the Commission that delivery to the Commission of the stock certificates referred to in the petition in this case duly endorsed in blank by the registered owners thereof would convey to the Commission valid title to said stock, free and clear of any liens or encumbrances whatsoever, and that said certificates had

been duly endorsed in blank by the registered owners thereof; that said certificates so endorsed were delivered to the Commission on or about October 26, 1938, by the American Trust Company of San Francisco, California, as escrow holder thereof, and as an essential part of the performance of the agreement of August 15, 1938; and that in performing its obligations under the agreement of August 15, 1938, and in accepting said stock certifi-
33 cates, the Commission relied upon said opinion; that upon delivery there were affixed to said stock certificates as a required condition of acceptance by the Maritime Commission transfer tax stamps in the amounts required by the laws of the United States to be affixed to such certificates when title thereto is conveyed.

7. That in order for the Estate of J. Harold Dollar, deceased, to convey unrestricted title to the Maritime Commission, Keith R. Ferguson, who, as above stated, was, in connection with the performance of the agreement of August 15, 1938, counsel for R. Stanley Dollar, Dollar of California, H. M. Lorber, and The Estate of J. Harold Dollar, deceased, and who was also an executor of said estate on September 2, 1938, acting with Robert Dollar, II, another executor of said estate, filed in the Superior Court of the State of California, in and for the County of Marin, a petition "For Order authorizing sale of stocks * * *," in which these executors recited, among other things, the ownership of the stock, the execution of the agreement of August 15, 1938, and the supplement thereto, and prayed for an order of court authorizing and directing them "to transfer all right, title, and interest of the above estate" in and to the stock which they subsequently delivered to the Commission, and otherwise to comply with the agreement of August 15, 1938, as supplemented; that on September 12, 1938, the court entered an order "authorizing sale of stock," confirming the agreements signed by the executors (the agreement of August 15, 1938, and the supplement thereto) and directing the executors "to transfer all right, title, and interest * * *" of the estate to certain stock to the Commission or its nominee, having found, among other things, that the consummation of the acts and things required by the agreement and its supplement were "for the best interest of the estate and its creditors, and of the heirs and beneficiaries under the Will * * *." True copies of said application and order are hereto attached, and marked Exhibits E–1 and E–2, respectively.

8. That the Commission has never entered into any contract, oral or written, direct or indirect, express or implied, with plaintiffs in this case, their predecessors in interest, or any of them, with respect to the stock described in the complaint in this case,

other than the contract of August 15, 1938, which, especial-
34 by the terms of paragraph 23 (d), thereof contemplates that the Commission may sell the stock; and especially has entered into no contract to accept or hold said stock as collateral for indebtedness or the equivalent of such collateral, or to reconvey any of said stock to those who conveyed it to the Commission on October 26, 1938, or any of them, under any circumstances whatsoever.

9. Under paragraphs 4 and 5 of the agreement of August 15, 1938, certain stock pledged to the Anglo California National Bank of San Francisco was to be transferred to the Maritime Commission, free and clear, if the indebtedness secured by the stock was paid within five years, or if the Commission should pay pledgee a sum equal to $2.00 per share for such pledged stock. 33,600 shares of this stock were held by R. Stanley Dollar, 11,273 shares by the Estate of J. Harold Dollar, deceased, and 6,660 shares by R. Stanley Dollar, the Estate of J. Harold Dollar, deceased, and Herbert Fleishhacker, jointly. The indebtedness was paid, and 49,313 shares of said stock were transferred to the Commission on or about September 22, 1941. The 2,220 shares of such pledged stock not transferred represent the one-third interest of Herbert Fleishhacker in the stock held jointly by Fleishhacker, R. Stanley Dollar, and the Estate of J. Harold Dollar, deceased. Herbert Fleishhacker did not sign the agreement of August 15, 1938.

10. That the Maritime Commission received the stock referred to in plaintiff's complaint on or about October 26, 1938, for the United States of America, and has ever since held, and now holds, said stock for the United States of America, and the Maritime Commission as an independent agency thereof.

11. That approximately one month before acquiring the stock referred to in the complaint herein, the Maritime Commission issued a press release which was given wide publicity, wherein it was stated that the Commission might dispose of "its" stock after it acquired the same, thereby giving notice to the world of its intention to sell said stock, should it so desire. A copy of said press release is attached hereto and marked Exhibit F.

35 12. That after the performance of the agreement of August 15, 1938, the name of Dollar of Delaware was changed to American President Lines, Ltd., and on or before September 6, 1943, American President Lines, Ltd., had fully satisfied and discharged all indebtedness due the United States of America from Dollar of Delaware and American President Lines, Ltd., all such indebtedness having been paid from earnings realized subsequent to October 26, 1938, and after the resignation of R. Stanley Dollar and Hugo Lorber as directors of Dollar of

Delaware, and after the cessation of, direct or indirect, control or management of Dollar of Delaware, or participation therein by any of these plaintiffs or their predecessors in interest.

13. That on or about July 6, 1943, the Commission issued a press release offering the stock referred to in the complaint in this case for sale, which press release was given wide publicity and constituted notice to the world of the Commission's intention to sell the stock. A copy of said press release is attached hereto and marked Exhibit "G".

14. That in response to the Commission's aforesaid public offer for sale by the Commission in 1943, the Commission received seven proposals to purchase the stock for substantial sums of money, and said proposals were considered by the Commission until October 19, 1943, on which date the Commission rejected all of them.

15. That notwithstanding the facts set out in paragraphs 9, 10, 11, 12, and 13, plaintiffs, nor their predecessors in interest, nor any of them, at any time between October 26, 1938 and July 1, 1945, advised the Commission that they or any of them asserted any right, power, title or interest thereto, or with respect of said stock, or that they in any way disputed the absolute ownership thereof by the United States of America, or sought by protest, legal action, or otherwise in any way to restrain or prevent the sale of the stock, or made any demand upon the Commission to return said stock to them, their predecessors in interest, or any of them, save that during the latter part of 1940, one J. H.
36 Rosenbaum, purporting to act as attorney for R. Stanley Dollar, and one L. N. Rosenbaum, his associate, asserted, in such capacity and for the benefit of other former stockholders of record, a claim of ownership in the stock here in controversy. In December 1940, affiant as Chairman of the Commission, informed Mr. L. M. Rosenbaum that such claim was without legal or moral foundation.

15. That there are now under consideration by the Maritime Commission, and have been under consideration by the Maritime Commission for more than 60 days, substantial offers by private individuals and organizations to purchase the stock referred to in the complaint, for sums aggregating millions of dollars; that defendants are now restrained from accepting any such offers; and that in the opinion of affiant, if the Commission be in anywise restrained or prevented from disposing of said stock, the Commission will thereby be hampered and impeded in the performance of the duty imposed upon it by Congressional mandate to further the development and maintenance of an adequate and well-balanced merchant marine, to promote the commerce of the United

States, and to aid in the national defense, and the United States be grievously injured and substantially damaged.

And further deponent saith not.

November 13, 1945.

Emory S. Land,
EMORY S. LAND.

CITY OF WASHINGTON,
District of Columbia, ss:

Emory S. Land, being duly sworn, says that he is one of the defendants in this case, that he has read the foregoing affidavit, and that all statements made therein are true and correct, save that allegations stated to be made upon information and belief he verily believes to be true and correct.

Jennie G. Armstein.
JENNIE G. ARMSTEIN,
Notary Public in and for the District of Columbia.

My Commission expires June 14, 1949.

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Exhibit B

SAN FRANCISCO, CALIFORNIA, *June 17, 1938.*

UNITED STATES MARITIME COMMISSION,
Washington, D. C.

GENTLEMEN: The consideration which our Board of Directors at its several meetings has been giving to the United States Maritime Commission's resolution of June 4, 1938, which contemplates the granting of a five-year operating differential subsidy to our company on the terms therein provided, was concluded on Thursday evening the 17th of June. There was thereupon forwarded you a telegram, copy of which is enclosed herewith in confirmation, indicating in part the result of such consideration, as well as the action of certain requested guarantors referred to in your resolution, and advising you that it would be followed by a letter with full information of the action of the Board. In conformity therewith, this letter is addressed to your Commission.

Treating first of the action of the Board with respect to the subsidy agreement, the form of which was annexed to your resolution, we are pleased to confirm our advices to you that the same meets with the Board's approval, with the following modifications:

1. It is desirous that under the heading "Description of Route" on page 2 of the form of subsidy, there be made provision for a third route, sailings over which route shall be optional with the

Operator, as follows: Between New York and a port or ports in Japan, China, the Philippine Islands, French Indo China and the Straits Settlements, and the Dutch East Indies, via the Panama Canal and ports in California and the Hawaiian Islands, with the privilege of calling at Boston and Havana.

2. That in lieu of Section 3 of the subsidy agreement found on page 3 under the heading "Replacement Program", the following (which was Article 3 of the subsidy agreement accompanying the Commission's letter of April 28, 1938) be substituted:

"3. Replacement of Subsidized Vessels. The Applicant agrees, promptly and with due diligence and a manner satisfactory to the Commission, (a) to develop a replacement program for the replacement of all of the Applicant's vessels, except the "Coolidge," by new vessels of a size, type and speed satisfactory to the Commission under Title VII of the Merchant Marine Act of 1936; and (b) to enter into contracts satisfactory to the Commission, under Title VII of the Act, for the charter of such newly constructed vessels in accordance with the terms thereof.

"If satisfactory progress is being made in the construction program referred to above, the old vessels employed by the Operator, which are to be replaced by the newly constructed vessels, may continue to be operated under this agreement pending replacement with the new vessels, and subsidy payments, shall be made with respect thereto whether or not such vessels shall at the time of operation be more than 20 years of age."

Next treating of the resolution proper, the Board has indicated its readiness to make application to the Reconstruction Finance Corporation for the loan in the resolution referred to, and
694 to comply with the terms and conditions precedent to the authorization of such a loan insofar as they are not in conflict with the provisions of the resolution of the United States Maritime Commission, as to which the Board of Directors has been unable to comply, and to execute and deliver a first preferred blanket mortgage on its operating fleet of thirteen vessels to secure such loan from the Reconstruction Finance Corporation and the advances to be made by the Commission for purpose of repairs, as in the resolution indicated, as well as to execute and deliver a junior blanket preferred mortgage in favor of the United States Maritime Commission to secure the indebtedness referred to in such resolution as the "subordinated indebtedness", and the necessary instruments to rearrange the amortization requirements with respect to the indebtedness referred to, in the manner set forth in the schedule attached to your resolution.

The Board further approved the provisions under Second Resolved of your resolution number 3 and 4.

As to provision numbered 5 thereof, the Board was advised that The Anglo California National Bank would agree to extend the indebtedness as in such provision set forth.

As to provision 7 thereof, the Board expressed its willingness to make effective the pledge therein referred to.

As above indicated, provisions 12 and 13 were also approved.

Furtherfore, the Board authorized the filing of formal application for a five-year operating differential subsidy, as set forth in provision 19.

A further provision of the resolution which has relation to the advances to be made by the Maritime Commission for repairs, the same being particularly numbered Third, the Board expressed itself as feeling, particularly insofar as the stipulation that the moneys therein referred to should be disbursed in reimbursement of like amounts previously paid by the Operator for repairs that such a provision might render it difficult to effect the repairs, inasmuch as there might not be funds available for payment of the repairs except such as would come from the Maritime Commission.

As to the other provisions not hereinabove referred to, the same relate in the main to requested guarantees of certain corporations and individuals, and were not matters on which the Board could act, except to call upon those parties for the guarantees in question. With respect thereto it received the following communications, copies of which are herewith enclosed and which are self-explanatory:

Letter of Dollar Steamship Line of California dated June 16, 1938.

Letter of the Robert Dollar Co., dated June 16, 1938.

Letter of H. M. Lorber dated June 16, 1938.

Letter of R. Stanley Dollar dated June 16, 1938.

After acting upon the resolution of your Commission, the Board took under consideration means other than as suggested by the resolution of maintaining continued operation of the line operated by its company. This came by way of a suggestion made because the Board feels it is the logical method under all the circumstances of accomplishing the purpose of the Maritime Commission, with which the Board is wholly in accord, in maintaining an essential trade route, and because of its feeling of a keen responsibility to its creditors, in which it considers the Commission must join. Not only this, but it appears to the Board to be substantially in
695 conformity with the provisions of Section 507 of the Merchant Marine Act, which section is Section 1157 of the United States Code Annotated. We refer to the suggestion as contained in the concluding portion of our telegram of June 16th to your Board, which is substantially as follows:

That this company promptly develop a replacement program on the basis following, whereby three combination freight and

passenger liners of improved "Coolidge type" would be constructed, to-wit, three ships at an estimated cost of Eleven Million Dollars, or a total of Thirty-three Million Dollars, as to which the construction differential subsidy would be fifty per cent, making the net cost to our company for the three ships referred to a total of $16,500,000. The cash payment under such an undertaking to be 25% of the latter amount, or in figures $4,125,000. The balance of such cost to be payable in twenty equal annual installments, the first of which to be paid one year after delivery of each vessel, with interest on such installments at the rate of 3½%.

That in consideration of the undertaking on the part of our company of such program, as indicated, the Commission shall take over at their full present value the following named vessels: "Coolidge," "Cleveland," "Taft," "Wilson," "Lincoln," "Pierce," "Adams," "Garfield," "Harrison," "Polk," "Hayes," "Monroe," and "Van Buren," these vessels having been valued at a fairly recent date by Captain A. F. Pillsbury, a former representative of the United States Shipping Board, and a recognized authority in such matters, at $18,550,000. The proceeds resulting from such transfer to be applied:

First, to the satisfaction of the mortgages now held by the United States Maritime Commission on the ships above enumerated, which now aggregate the principal amount of $7,494,158.04:

Second, to the cash payment of the 25% payable on the three ships to be constructed, amounting to $4,125,000.

Further, an agreement with us by the Commission for the continuation of the operation of the ships to be transferred to the Commission on their present trade routes under some mutually satisfactory form of operating agreement should be entered into, to remain effective until such time as the three ships to be constructed, as hereinbefore referred to, shall be available to replace the service now being maintained by the ships so to be transferred.

Finally, that the Maritime Commission should grant an adequate operating differential subsidy covering the new ships so to be operated, in order that our company in operating them may be placed on parity with foreign competition.

We await the further suggestion of your Commission, with the assurance that so far as it is possible to the Board of Directors of our company, we will continue to seek means of cooperation with the Commission to the end that the essential trans-Pacific trade route may be maintained.

Submitted on order of the Board of Directors of Dollar Steamship Lines Inc., Ltd.

D. T. BUCKLEY, *Secretary.*

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R. STANLEY DOLLAR,
Dollar Steamship Lines Inc., Ltd., San Francisco, California.

TO THE BOARD OF DIRECTORS,
Dollar Steamship Lines Inc., Ltd., San Francisco, California.

GENTLEMEN: I have had before me the matter of the requested guarantee by me as outlined in the resolution of the United States Maritime Commission of June 4, 1938, relative to an operating-differential subsidy for your company.

After mature consideration I must with regret advise you that I am unable to comply with the requested requirements.

I appreciate that it is desirable that the operation of the line be continued, in the public interest. With that in mind may I offer the suggestion that it may be advisable that means be devised whereby the fleet of your company, valued in 1937 by Captain A. F. Pillsbury, a surveyor of unquestionable ability and reputation, at Eighteen Million Dollars, may be transferred to the Maritime Commission against full satisfaction of the existing mortgage indebtedness on the vessels in the sum of $7,474,192.94. While not suggesting the details as to how this may be accomplished, it is not out of place to call your attention to the fact that provision should be made for the protection of creditors in any negotiations which may be consummated along these lines with the Commission.

Yours very truly,

R. STANLEY DOLLAR.

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DOLLAR STEAMSHIP LINES,
San Francisco, California, June 10, 1938.

BOARD OF DIRECTORS,
Dollar Steamship Lines Inc., Ltd.,
San Francisco, California.

DEAR SIRS: Referring to your request that I execute and deliver to the United States Maritime Commission a guarantee of subordinated indebtedness of your company secured by a pledge or assignment of certain stocks, I wish to comment as follows:

The present mortgage indebtedness of your company to the Maritime Commission consists of the following:

S. S. "President Coolidge"	$3,918,964.00
7—502 type Round-World combination passenger and freight ships, each	256,277.57
5—535 type Trans-Pacific combination passenger and freight ships, each	356,250.00
S. S. "President Johnson," combination passenger and freight ship	15,819.19
S. S. "President Fillmore," combination passenger and freight ship	75,000.00

I am of the opinion that these vessels have all been paid down to such a low point that there is a very considerable equity in all the ships and the Maritime Commission are amply secured.

Furthermore, the five year proposed subsidy agreement, contract provides for the impounding of depreciation at the rate of 5% per annum on their original cost, which monies will still further reduce the above indebtedness.

I understand it is proposed to borrow $2,000,000 from the R. F. C. for working capital and $1,500,000 additional from the Maritime Commission to provide for repairs and improvements to the 502 and 535 type steamers. If the Maritime Commission allow your company full parity in every respect during the five year subsidy period, this will permit the company to operate at a profit and its assets will not be impaired so that these loans can easily be repaid during the period.

Furthermore, the R. F. C. loan provides that no dividends can be paid to the stockholders so long as any part of their loan remains unpaid. Inasmuch as the subsidy agreement permits the company to earn at least 10% per annum on their capital necessarily employed in the business, it would permit of an accumulation of 50% of profits during this period, which, together with the general obligation of the company, in my opinion, will provide ample security to meet this commitment.

698 In view of this, I do not think the Dollar Steamship Lines Inc., Ltd. should be called upon to provide collateral in excess of their own resources, and I am unwilling to guarantee indebtedness for above reasons.

However, in the event you are able to secure guarantees of 80% of the present holders of the 252,000 shares of Class A stock now outstanding, I will be very happy to pledge my holdings of 9,174 shares of Class A stock, subject to the guarantee being limited to the collateral.

Yours very truly,

H. M. LORBER.

699 THE ROBERT DOLLAR CO.
Robert Dollar Building,
San Francisco, June 16, 1938.

DOLLAR STEAMSHIP LINES INC., LTD.,
311 California Street,
San Francisco, California.

GENTLEMEN: By a resolution of the Board of Directors of The Robert Dollar Co., I have been requested to advise you that that Company respectfully declines to execute the guarantee and pledge the collateral as security therefore as requested by the

resolution of the United States Maritime Commission adopted June 4, 1938.

I have further to advise that on June 10, 1938 at a Special Meeting of the Board of Directors of The Robert Dollar Co. the following resolution was adopted:

"RESOLVED, That the execution of the guarantee in the form and manner set forth in Paragraph 9 of Resolved Second, of the resolution of the United States Maritime Commission under date of June 4, 1938, is opposed to the best interests of this corporation, and that such guarantee be therefore not executed.

Very truly yours,

THE ROBERT DOLLAR CO.,
By KEITH R. FERGUSON,
Director.

700. DOLLAR STEAMSHIP LINE,
San Francisco, California, June 16, 1938.

DOLLAR STEAMSHIP LINE INC., LTD.,
311 California Street,
San Francisco, California.

GENTLEMEN: Referring to the resolution of the United States Maritime Commission adopted June 4, 1938, in reference to requirements in connection with a proposed operating differential subsidy agreement for your Company, we have to advise that the terms thereof, in our opinion, are unworkable.

The proposed subsidy of about $3,000,000 annually is, in our opinion, inadequate to meet foreign cost of operation, and does not give full parity to your Company.

This Company is co-maker of ship sale notes on seven (7) round-the-world steamers of the 502 type and five (5) trans-Pacific steamers of the 535 type, aggregating $3,575,193.04. The sound value of these vessels, figured on a going-concern value, far exceeds this amount. Captain A. F. Pillsbury, an independent and recognized authority, appraised these vessels on August 24, 1937, at $12,300,000 as their going-concern value.

On June 13, 1938, Congress passed a bill which would permit of the United States Maritime Commission taking over these vessels and operating them for their own account. If this power were exercised, it would have the effect of making the Common stock of Dollar Steamship Lines Inc., Ltd., of no value; it would jeopardize the outstanding claims of its creditors who carried their credits against the Company from February 1, 1937, to June 30, 1937, during which time the United States Maritime Commission impounded the Company's mail pay aggregating $1,030,496.68 which on October 8, 1937, was offset against the ship sales

notes, the creditors also being instrumental in maintaining this all-important American line during the period from June 30, 1937, to January 28, 1938, during which period the Company was negotiating for a subsidy and during that time received no Government aid.

In view of this ominous situation and by reason of the fact that both Dollar Steamship Lines Inc., Ltd., and Dollar Steamship Line (California) have guaranteed to hold R. Stanley Dollar harmless as a co-maker of the ship-sales notes, and with the view of protecting your creditors, your employees, and maintaining the line, this Company, Dollar Steamship Line (California) undertakes the following in order to enable you to negotiate a more workable arrangement with the United States Maritime Commission:

1. This Company will surrender to the United States Maritime Commission 1,872,210 shares of Common B, capital stock in your Company, and will undertake to acquire and surrender to the Commission an additional 227,790 shares of Class B common capital stock of your company.

2. It will arrange to acquire and cancel the managing agency agreement with the Robert Dollar Co., dated June 23, 1926.

3. It will arrange to procure for your Company all of the furniture, fixtures belonging to The Robert Dollar Co. now used in your leased premises; together with all of the automobiles, belonging to The Robert Dollar Co., at a price equal to their going-concern appraised value.

701 4. It will cause to be left with you, the personnel you now have.

5. Your Company is to assume all leases of all property now used by you and said leases are to be taken directly in your name.

6. It is a condition that you will change the name of your Company, and that you shall not use the house flag, or funnel insignia, or any other trade insignia now employed by you.

7. Furthermore, all ship-sales notes and the mortgages securing same are to be cancelled and new notes and mortgages given by your Company direct.

These agreements shall all be in a form satisfactory to and approved by our attorney.

Very truly yours,

DOLLAR STEAMSHIP LINE (California),
By H. M. LORBER, *Vice President.*

715 *Exhibit D*

Subject: Acts and proceedings taken in connection with the consummation of the Adjustment Plan Agreement executed by the Commission, Dollar Steamship Lines Inc., Ltd., et al.,

dated August 15, 1938, as modified by Agreement dated August 19, 1938.

In connection with the consummation of the acts and things required to be done under the aforementioned agreements, and with particular reference to the instruments of transfer, assignments, agreements, and other instruments listed below under the heading "Documents" and to be executed by the parties thereto including the persons respectively listed below under the heading "Parties," I wish to advise that I am counsel for said Parties; that as such counsel and with respect to such of the parties as are corporations I have supervised or examined and I am familiar with the proceedings relating to the organization and present status of said corporations, and I have supervised and examined the corporate proceedings authorizing the execution of said proposed instruments of transfer, assignment, agreements, and other instruments. I have also examined the incorporation papers of said corporations and all amendments thereto, the bylaws and other regulations and the applicable statutes relating to the conduct of their business and execution of such instruments. The instruments of transfer, assignments, agreements, and other documents to which this opinion relates, are as follows:

A. Document.—Stock certificates representing in the aggregate 227,790 shares of the class B stock of Dollar Steamship Lines Inc. Ltd. (hereinafter called Dollar of Delaware), each of the par value of $1, standing in the name of The Robert Dollar Co., have all been duly assigned and delivered to Dollar Steamship Line (hereinafter called Dollar of Delaware).

Parties.—The Robert Dollar Co. and Dollar of California (both California corporations).

B. Document.—Stock certificates representing in the aggregate 2,100,000 shares of the class B stock of Dollar of Delaware, of the par value of $1 each, including the 227,790 shares referred to in lettered subdivision A of this opinion, all standing in the name of Dollar of California (except as to five certificates representing five shares of said class B stock of $1 par value standing in the names of Arthur B. Poole, J. Hugli Jackson, Paul E. Hoover, Grant H. Wren, and Joseph R. Sheehan, constituting the qualifying shares of said directors), all of which certificates have been duly endorsed in blank by the registered owners thereof, and delivered to the Commission.

Parties.—Dollar of California.

C. Document.—Stock certificates representing in the aggregate 37,771 shares of the Class A stock of Dollar of Delaware,

standing in the names of the following persons in the respective amounts of stock set forth opposite their names:

J. Harold Dollar estate		24,107
R. Stanley Dollar	1,780	
C. P. Ritter	513	
		2,293
H. M. Lorber		9,174
Dollar of California		2,075
Admiral Oriental Line		122

which certificates have been duly endorsed in blank by the registered owners thereof and delivered to the Commission.

716 Parties.—J. Harold Dollar Estate, R. Stanley Dollar, C. P. Ritter, H. M. Lorber, Dollar of California, Admiral Oriental Line (a Nevada corporation).

D. Document.—Bill of sale from The Robert Dollar Co., seller, to Dollar of California, covering all of the tangible property referred to in paragraph 9 of the Adjustment Plan in accordance with the construction of said paragraph 9 as placed thereon by letters exchanged between The Robert Dollar Co., Dollar of California, and Reginald S. Laughlin, special counsel for United States Maritime Commission.

Parties.—The Robert Dollar Co. and Dollar of California.

E. Document.—A bill of sale, covering all of the property included in the bill of sale referred to in lettered subdivision D of this opinion by Dollar of California as seller and Dollar of Delaware as purchaser.

Party.—Dollar of California.

From such examination, I am of the opinion that:

1. The corporations mentioned as "Parties" in subdivisions A to E above have been duly organized and are existing under the laws of the several States of the United States as recited in the foregoing lettered subdivisions of this opinion, with full power to execute and deliver said documents executed by them as set forth in said lettered subdivisions and to sell, assign, and transfer the shares of stock and tangible property which said documents purport to transfer, respectively.

2. The execution and delivery of the documents set forth in the lettered subdivisions A to E, inclusive, of this opinion have been duly authorized by proper action of the board of directors of such of the "Parties" thereto as are corporations, insofar as each such corporation proposes to execute any of such documents, no other authorization being required.

3. The J. Harold Dollar Estate being one of the parties transferring certain shares of class A stock of Dollar of Delaware as set forth in lettered subdivision C of this opinion, has executed and delivered such document by the act and deed of Keith R. Fer-

guson and Robert Dollar, II, who are the executors of said estate, and who have been authorized to execute and deliver such documents on behalf of said estate by due order of the court having jurisdiction over said estate.

4. The documents referred to in lettered subdivisions B, C, and E, when executed by the persons whose names (and official positions when acting as corporate officers or fiduciaries) are listed in schedule A to this opinion letter, and delivered in the case of the certificates set forth in subdivisions B and C to the United States Maritime Commission, and in the case of the bill of sale listed in subdivision E, to Dollar of Delaware, will constitute valid and legally enforceable instruments of transfer, and will convey to the Commission and to Dollar of Delaware, respectively, valid title to the shares of stock and the physical property covered by such instruments of transfer, free and clear of any liens or encumbrances whatsoever.

(Signed) KEITH R. FERGUSON.

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SCHEDULE A

1. Stock certificates representing in the aggregate 2,100,000 shares of the class B stock of Dollar of Delaware. Endorsed in blank by—

(1) M. Thompson as Second Vice President of Dollar Steamship Line: Provided, however, That not more than six such shares may be in the names of individuals, in which event such certificates will be endorsed in blank by such individuals.

2. Stock certificates representing in the aggregate 37,771 shares of the class A stock of Dollar of Delaware. Endorsed in blank by—

(1) Keith R. Ferguson and Robert Dollar II, as sole executors of the J. Harold Dollar Estate (24,107 shares in the aggregate).

(2) R. Stanley Dollar (1,780 shares in the aggregate).

(3) C. P. Ritter (513 shares in the aggregate).

(4) H. M. Lorber (9,174 shares in the aggregate).

(5) M. Thompson as Second Vice President of Dollar Steamship Line (2,075 shares in the aggregate).

(6) Robert Dollar II, as Vice President of Admiral Oriental Line (122 shares in the aggregate).

3. Bill of sale, covering all the tangible property referred to in paragraph 9 of the Adjustment Plan Agreement, to Dollar of Delaware, in accordance with letters exchanged between Dollar of California and Reginald S. Laughlin, special counsel of the United States Maritime Commission.

Executed by M. Thompson as Second Vice President and A. E. Lang as Assistant Secretary of Dollar Steamship Line.

718 *Exhibit E-1*

Filed Sept. 2, 1938. Geo. S. Jones, County Clerk; by Jack Stuty, Deputy.

In the Superior Court of the State of California, in and for the County of Marin

No. 5160

IN THE MATTER OF THE ESTATE OF JOHN HAROLD DOLLAR, ALSO KNOWN AS J. HAROLD DOLLAR, DECEASED

PETITION OF EXECUTORS FOR ORDER AUTHORIZING SALE OF STOCKS AND APPROVING AND CONFIRMING AGREEMENT RESPECTING ADJUSTMENT PLAN OF DOLLAR STEAMSHIP LINES, INC., LTD.

To the Honorable THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, in and for the County of Marin:

The Petition of Robert Dollar II, and Keith R. Ferguson, Executors of the last will and testament of John Harold Dollar, also known as J. Harold Dollar, deceased, respectfully shows:

I

That John Harold Dollar, also known as J. Harold Dollar, the above named deceased, died testate on the 7th day of April 1936, and that Robert Dollar II and Keith R. Ferguson are now, and have been since the 24th day of April 1936, the duly appointed, qualified and acting Executors of the last will and testament of said deceased, which will was duly admitted to probate herein on April 24, 1936.

719 II

That on the 6th day of May 1936 H. De La Montanya was duly appointed by this Court, as the sole appraiser of the above entitled Estate, and that the executors of said Estate have duly prepared and placed in the hands of said Appraiser an Inventory of all of the assets of said estate, but that by reason of the fact that the greater portion of the assets of said Estate consist of shares of stock of Steamship companies which is closely held, and not listed on the market, the Appraiser has, as yet, been unable to complete and file an appraisement of the assets of said Estate.

III

That on the 29th day of January 1938 said Executors of said Estate filed their First Account of their Administration, and on the 11th day of February 1938 said account was approved, allowed, and settled.

IV

That said Estate is the owner of 24,107 shares of Class A capital stock of Dollar Steamship Lines, Inc., Ltd.; it is also the owner of 11,273 shares Class A capital stock of Dollar Steamship Lines, Inc., Ltd., and the owner of an undivided one-third (1/3) of 6,660 shares of Class A capital stock of Dollar Steamship Lines, Inc., Ltd., which latter 11,273 shares and the one-third (1/3) undivided interest in said 6,660 shares is pledged to secure the payment of obligations to Anglo California National Bank of San Francisco.

That said Estate is the owner of approximately forty percent (40%) of the issued and outstanding capital stock of The Robert Dollar Co. That The Robert Dollar Co. is the owner of 227,790 shares of Class B capital stock of Dollar Steamship Lines, Inc., Ltd., and is the owner of 43,912½ shares of the capital stock of Dollar Steamship Line, a California corporation, being over thirty-five percent (35%) of a total authorized and issued capital stock of 125,000 shares; that the above-named Estate is the owner of 6,175½ shares of the capital stock of Dollar Steamship Line, a California corporation, and is the owner of a large block of stock of Dollar Investment Company, which, in turn, is the owner of 29,155 shares of the capital stock of Dollar Steamship Line, a California corporation, being over twenty-three percent (23%) of the total authorized and issued capital stock.

V

That Dollar Steamship Line, a California corporation is indebted to the United States of America on certain Ship Mortgage Notes in the principal amount of $3,574,310.56, and that Dollar Steamship Lines, Inc., Ltd., a Delaware corporation, was, on June 30, 1938, indebted to the United States of America in the principal amount of $7,584,093.66, together with interest, and indebted to other creditors on June 30, 1938, in the sum of $5,709,134.87, a total indebtedness of $13,284,228.53, all as shown by the affidavit of D. T. Buckley, hereto attached, marked "Exhibit A" and by reference made a part thereof. That the Robert Dollar Co. is indebted, in the sum of $1,500,000 to Dollar Steamship Lines, Ltd. (Hongkong), a British corporation, all of whose stock is owned by Dollar Steamship Line of California.

VI

That in the opinion of your Petitioners, the value of the vessels of Dollar Steamship Lines, Inc., Ltd., a Delaware corporation; at a forced sale, would be insufficient to pay its indebtedness to the United States of America, and that in the event of foreclosure of the mortgages on said vessels, there would be a deficiency judgment entered against Dollar Steamship Line, a California corporation in a very substantial amount, which would thereby cause a great, if not a total loss in the value of the holdings of the Estate in the capital stock of Dollar Steamship Line, a California corporation.

VII

That an Agreement Respecting Adjustment Plan of Dollar Steamship Lines, Inc., Ltd., copy of which Agreement is hereto attached, marked "Exhibit B," and by reference made a part of this Petition; and a Supplemental Agreement Respecting Adjustment Plan of Dollar Steamship Lines, Inc., Ltd., copy of which
721 Agreement is hereto attached, marked "Exhibit C," and by reference made a part of this Petition, has been negotiated and executed by the parties thereto, and signed by your Petitioners subject to confirmation by this Court.

VIII

That to comply with the provisions of said Agreements, Exhibits "B" and "C", Dollar Steamship Line, a California corporation, will procure from Dollar Steamship Lines Ltd. (Hongkong) a British corporation, the note of The Robert Dollar Co. in the sum of $1,500,000. and will cause the full satisfaction of said note and indebtedness to be made in consideration of the transfer by The Robert Dollar Co. of certain office furniture, furnishings, fixtures and equipment and other property referred to in Paragraph 9 of the Agreement marked "Exhibit B" and the cancellation of the exceedingly valuable Management Agreement Referred to in Paragraph 7 of said Agreement marked "Exhibit B."

IX

That your Petitioners are informed and believe that the Agreements marked "Exhibits B and C" are to the best interests of the Estate, its creditors, beneficiaries under the will of said deceased, and all persons interested in said Estate, in that the consideration for the transfer of the Class A stock of Dollar Steamship Lines

Inc. Ltd. to the United States Maritime Commission will increase the value of the stock owned by the Estate in The Robert Dollar Co., Dollar Investment Co., Dollar Steamship Line, a California corporation, and other corporations in which the Estate is interested, many times that of the value of the Class A stock of Dollar Steamship Lines Inc. Ltd., a Delaware corporation.

X

That your Petitioners, believing it to be for the best interests of the above named Estate, its creditors beneficiaries under the will of the above named deceased, and all persons interested in said Estate have executed said Agreements subject to the confirmation and approval of this Court.

WHEREFORE, Petitioners pray that this Court enter
722 its Order approving and confirming the execution by your Petitioners, of said Agreements hereto attached, marked "Exhibit B and C", and authorizing and directing your Petitioners, as the Executors of the last will and testament of the above-named deceased, to transfer all right, title, and interest of the above estate in and to 24,107 shares of Class A stock of Dollar Steamship Lines Inc. Ltd., a Delaware corporation, unencumbered; and to transfer 11,273 shares of Class A capital stock, together with a one-third (⅓) undivided interest in an additional 6,660 shares of said Class A, capital stock of Dollar Steamship Lines Inc. Ltd., a Delaware corporation, subject to the pledge agreement thereof with Anglo California National Bank of San Francisco, and that your Petitioners be further authorized and directed to do all the things and take all the steps, acts, and proceedings, and execute and deliver all certificates, documents, instruments and writings that may be necessary or proper to be done on the part of the J. Harold Dollar Estate, and/or Harold Dollar Estate, to accomplish or facilitate the consummation of the transactions and deeds referred to and set forth in said agreements marked "Exhibit B and C" attached to this Petition.

(S) Robert Dollar II
ROBERT DOLLAR II,

(S) Keith R. Ferguson,
KEITH R. FERGUSON,
Petitioners.

(S) KEITH R. FERGUSON,
Attorney for Petitioners.

723 *Exhibit E-2*

Filed Sept. 12, 1938. Geo. S. Jones, County Clerk; by M. Wernich, Deputy.

In the Superior Court of the State of California, in and for the County of Marin

No. 5160

IN THE MATTER OF THE ESTATE OF JOHN HAROLD DOLLAR, ALSO KNOWN AS J. HAROLD DOLLAR, DECEASED

ORDER AUTHORIZING SALE OF STOCKS AND APPROVING AND CONFIRMING AGREEMENT RESPECTING ADJUSTMENT PLAN OF DOLLAR STEAMSHIP LINES, INC. LTD., AS EXECUTED BY EXECUTORS

The Petition of Robert Dollar II and Keith R. Ferguson, Executors of the Last Will and Testament of the above named decedent for an Order Authorizing Sale of Stocks and Approving and confirming Agreement respecting Adjustment Plan of Dollar Steamship Lines, Inc., Ltd., coming on regularly to be heard this 12th day of September 1938, the petitioners appearing in person and by their attorney, Keith R. Ferguson, Esq., and proof being made to the satisfaction of this Court that due notice of the time and place of the hearing of said Petition has been given in the manner and for the time required by law; and the Anglo California National Bank of San Francisco, California, and the Seattle-First National Bank of Seattle, Washington, having the two largest claims on file against said Estate, and Agnes Barr Dollar and Alice Barr Dollar, widow and daughter of the above named deceased, all having, in writing, waived notice of the time and place of the hearing of said Petition and giving their consent to the entry of an order by this Court approving and confirming said agreement respecting Adjustment Plan of Dollar Steam-

724 ship Lipes Inc., Ltd., which said written waivers and consents have been filed herein and oral and documentary evidence having been introduced, and it appearing to the satisfaction of the Court that the allegations of said Petition are true, and it further appearing to the Court and the Court hereby finding that the agreement and supplemental agreement respecting Adjustment Plan of Dollar Steamship Lines, Inc., Ltd., copies of which are attached to said Petition marked "Exhibits B and C"

and the consummation of the acts and things therein required to be done and performed, are for the best interests of the Estate and its creditors and of the heirs and beneficiaries under the Will of said deceased; and the Court being fully advised in the premises, and no creditor, beneficiary, or heir of the above named deceased or other person interested in the Estate appearing or making any objection to the granting of said petition;

It is hereby ordered, adjusted, and decreed that the Petition of Robert Dollar II and Keith R. Ferguson, Executors of the Last Will and Testament of John Harold Dollar also known as J. Harold Dollar, Deceased, for order authorizing sale of stocks and approving and confirming the agreement and supplemental agreement respecting Adjustment Plan of Dollar Steamship Lines, Inc., Ltd., copies of which agreement and supplemental agreement are attached to said Petition and marked "Exhibits B and *B*"; be, and the same is hereby approved and confirmed, and

It is further ordered, adjudged and decreed that the execution by Robert Dollar II and Keith F. Ferguson as Executors of the last Will and Testament of J. Harold Dollar, Deceased, of the agreement and supplemental agreement respecting Adjustment Plan of Dollar Steamship Lines, Inc., Ltd., copies of which are attached to said Petition and marked "Exhibits B and C" be, and the same is hereby approved and confirmed, and

It is further ordered, adjudged and decreed that Robert Dollar II and Keith R. Ferguson as Executors of the above named Estate be, and they are hereby authorized and directed to transfer all right, title, and interest of the above entitled Estate in and to 21,107 shares of class A stock of Dollar Steamship Lines, Inc., Ltd., a Delaware corporation, unencumbered; with one-third (⅓) interest in an additional 6,660 shares of said class A
725 capital stock of Dollar Steamship Lines, Inc., Ltd., a Delaware corporation, subject to the pledge agreement thereof with Anglo California National Bank of San Francisco to the United States Maritime Commission or its nominee; and

It is further ordered, adjudged and decreed That said Robert Dollar II and Keith R. Ferguson as said Executors be, and they are hereby authorized and directed to do all the things and take all the steps, acts and proceedings, and execute and deliver all certificates, documents, instruments and writings that may be necessary or proper to be done on the part of the above entitled Estate to accomplish or facilitate the consummation of the transactions and deeds referred to and set forth in said agreement and

supplemental agreement, copies of which are attached to said Petition and marked "Exhibits B and C".

Done in open Court this 12th day of September, 1938.

(S) EDWARD BUTLER, *Superior Judge.*

726 *Exhibit F*

UNITED STATES MARITIME COMMISSION,
Washington, September 27, 1938.

Immediate release.

The United States Maritime Commission today announced final approval of the adjustment plan signed last month under which Dollar Steamship Lines, Inc., Ltd., will be able to resume its extensive steamship services.

Under the terms of that agreement, the Reconstruction Finance Corporation will loan the company up to $2,500,000 for working capital. The Commission will advance up to $2,000,000 for repairs to the company's ships upon which it holds mortgages. The Commission has also approved an operating-differential subsidy for the fleet of approximately $3,000,000 per year subject, however, to revision at any time that conditions warrant such action during the five-year life of the agreement. This subsidy is designed to meet the substantially lower wage and operating costs of foreign flag competition, the majority of which on the trans-Pacific run is Japanese.

The Commission anticipates that these various funds will be available to the company within the next two weeks.

Chairman Emory S. Land emphasized the fact that company management, under the adjustment plan, remains in private hands. The Commission merely holds the position of majority stockholder through transfer to it, under the adjustment plan, of approximately 90 percent of the corporation's common stock. It is entirely possible, the Chairman said, that the Commission, should it find it advantageous and prudent to do so, may dispose of its stock in the future.

The Board of Directors has invited the Honorable William Gibbs McAdoo to become its Chairman and he has accepted. Senator McAdoo, who sponsored the first shipping bill before Congress in 1914 to put the strength of the Government behind an adequate merchant marine, will give his entire time to the company's affairs. The former Secretary of the Treasury's comprehensive knowledge and experience in finance and transportation should be extremely valuable to the corporation, Chairman Land said.

727 The Board has also invited Joseph R. Sheehan, Executive Director of the United States Maritime Commission, to accept the post of president of the corporation. Mr. Sheehan has

accepted. He will resign from his present position, severing all connections with the Government, to devote his entire time to Dollar management.

Mr. R. Stanley Dollar and Mr. H. L. Lorber will retire from participation in the company's affairs.

Informal discussions have already been held with Mr. McAdoo and several directors in connection with strengthening the higher executive personnel. The Commission hopes to establish well-rounded, strong, and aggressive financial, operating and technical staffs. Discussions will be continued during the coming week so that the directors may immediately take the necessary action to revive this world-wide shipping service.

No changes with respect to personnel generally are contemplated, Chairman Land said. He added that the company's future lies entirely within the hands of the directors and the new management. They will have complete freedom of action. The Commission does not intend to manage the Board of Directors by remote control from Washington, according to Chairman Land. It will deal with the corporation as with any other subsidized shipping company.

Repair work on the company's ships will be expedited, the Chairman said, and one of the major items in this program is improvement of crew's quarters which on some ships at present he described as deplorable.

Resumption of the company's services will provide a sorely needed opportunity for reemployment of maritime labor and at the same time, give shippers the tonnage which for some months has been dangerously low on the West Coast.

The company's subsidized fleet included the following ships: "President Coolidge," "President Cleveland," "President Taft,"
"President Lincoln," "President Wilson," "President
728 Pierce," "President Hayes," "President Monroe," "President
Adams," "President Harrison," "President Polk," "President Garfield," and "President Van Buren."

The importance of maintaining the company as an independent shipping unit on the West Coast is indicated by the fact that it employs normally approximately 2,500 officers and men aboard ship whose compensation approximates $2,700,000 per year; 600 shore employees whose compensation approximates $835,000 per year; purchases approximately $8,000,000 worth of stores and equipment annually and spends more than $1,000,000 per year in repairs.

The agreement under which these services are to be revived provides a replacement program for the company's fleet with the exception of the "President Coolidge," the largest and newest of its ships. The operator agrees to take the necessary action to in-

troduce into its services, under this program new vessels now being designed by the Commission for sale or charter to the company.

The Commission has recognized the imperative and immediate need of a replacement program for the Pacific Coast and such a program, involving an expenditure of approximately $100,000,000 for at least 24 new ships, was outlined in the Commission's press release of April 29, 1938. In this press release, the Commission recognized the importance of Dollar Line services as a vital part of the program.

A resume of the company's affairs leads to certain inescapable conclusions. The company's problems have been fundamental and chronic. They involve a recurrence of causes recognized by the government over a long period of time.

It should be said, however, that the major problem is not attributable to a lack of business. Dollar Steamship Lines, Inc., Ltd. had gross operating revenues from its combination cargo and passenger vessels of more than $13,000,000 per annum during the eight years, 1930–37 inclusive. Almost $5,000,000 per annum of this sum was accounted for by passenger traffic.

729 The real problem is one which has harassed successive federal agencies having to do with shipping. The present Commission determined some time ago that the principal issues must be met squarely and the basic causes eliminated, Chairman Land explained.

Foremost of these, he said, has been unsatisfactory management arising from failure of controlling interests to discharge satisfactorily their functions and to meeting their obligations. These failures are indicated by excessive withdrawals over a period of years for salaries of executive officers. The volume of these withdrawals in the case of Mr. R. Stanley Dollar from the years 1923 to 1933 and for six months in 1934 amounted to $2,526,501.22. During the same period, Mr. J. Harold Dollar's withdrawals aggregated $1,081,693.62. Mr. H. L. Lorber's withdrawals totaled $737,926.21 and those of Mr. Herbert Fleishhacker, $377,756.85.

Commissions to executive officers on company transactions were another indication of unsound management. In May of 1925, for instance, company directors voted R. Stanley Dollar $281,225 as a 5 per cent commission for purchasing from the government five combination passenger and cargo vessels for his own company. The commission was added to the cost of the vessels on the company's books.

A third indication of unsound management appears in payments of management fees to affiliated companies. For example, in 1932, while the operating company was losing over a million dollars, The Robert Dollar Company, its managing agent, whose principal source of income was from a management contract, made

a profit of over $60,000 and paid executive salaries of $135,000. The Robert Dollar Company was owned by substantially the same interests which owned the operating company. The management contract is terminated under the adjustment plan, thus effecting an economy of at least $150,000 per year.

Another illustration involves the Pacific Lighterage Corporation, a former affiliate, during the years 1928 to 1933 when
730 it had profits of approximately $1,500,000 and paid dividends of almost $1,000,000 by reason of its relationship to the operating company.

Dollar management has failed conspicuously to cooperate with creditors for the benefit of the company, Chairman Land said, and controlling interests have persisted in an attitude which the Commission found inimical to the sound development and operation of an essential American flag service from the Pacific Coast.

As a direct consequence of the activities cited above, there has been a constantly increasing current trade debt; an accelerated dissipation of cash and a resultant weakening of the company's financial position; inability to meet long-term obligations to the government and failure to maintain adequate shipping services for which the government had been subsidizing the line. One very important result of these circumstances, has been neglect of the company's fleet because of the inadequacy of maintenance expenditures. This condition, has in a large measure, made necessary the Commission's advance of up to $2,000,000 for ship repairs.

Other factors, of course, had contributed, but the fact remains that upon the management rests the primary responsibility for the company's present regrettable position. Minor factors involved have included strikes, changes in legal requirements as to citizenship of crews, and additional safety-at-sea requirements promulgated by the Congress to prevent such disasters as we have had in the not distant past.

The Commission has given long and diligent attention to the entire Dollar problem, Chairman Land explained, because of its vital importance to our foreign trade and national defense. Records of the Commission's Secretary disclose that one or another aspect of the Dollar problem has engaged the Commission's attention at more than 100 regular meetings. In addition, nearly a score of special meetings have been held on the subject.

Examination of the records of these meetings, Chairman Land said, show that the Commission has constantly sought a
731 type of management commensurate with the importance of the company's world-wide shipping interests and the public interest therein involved.

The Commission's immediate objective, he added, has been the maintenance and protection of an adequate American flag service from the West Coast to the Orient; protection of the government's investment in the Company by reason of past ship sales and ship construction notes, and to treat fairly and equitably the creditors, who have during the past few years been an important factor in keeping the company alive.

732 *Exhibit G*

UNITED STATES MARITIME COMMISSION,
Washington, July 6, 1943.

Immediate Release

The Maritime Commission announced today that it is giving consideration to the possibility of bringing about private ownership of the American President Lines.

The announcement said: "The Commission is giving consideration to the possibility of bringing about private ownership of the American President Lines at the appropriate time. Parties who desire to submit comprehensive and definite proposals with that end in view should place the same in the hands of the Commission not later than September 15, 1943."

This announcement is in answer to a number of inquiries received by the Commission as to its policy with respect to the ownership of the company.

The American President Lines company was formerly the Dollar Steamship Lines, Inc., Ltd., well known for its trans-Pacific and Around-the-World services operated by it for many years. As a result of serious financial difficulties the Company was reorganized in 1938, largely under the direction of the Maritime Commission which took measures to insure the continuation of the services in these essential trade routes.

In the reorganization the name of the Company was changed to "American President Lines, Inc.". Some of the debts of the Company were covered by debentures and preferred stock, and the Maritime Commission, to protect its interests and insure continuation of service, came into possession of 80 per cent of the common stock. Although the Commission had full voting control, it caused the Company to be operated by a Board of Directors which included representative local interests of San Francisco and former creditors of the concern.

In connection with the reorganization the Company incurred heavy indebtedness for working capital purposes and to put its fleet of vessels into proper operating condition. This indebtedness has since been paid off.

Dr. Henry F. Grady of San Francisco, former Assistant Secretary of State, and former Dean of the College of Commerce of the University of California, is President of the American President Lines.

733 In the District Court of the United States for the District of Columbia

Civil Action No. 31468

IN THE MATTER OF R. STANLEY DOLLAR (AN INDIVIDUAL), ET AL.

vs.

EMORY S. LAND (CHAIRMAN, UNITED STATES MARITIME COMMISSION), ET AL.

Affidavit

Filed Nov. 15, 1945

CITY OF WASHINGTON,
District of Columbia, ss:

Emory S. Land, being first duly sworn, deposes and says:

1. That he and the other defendants herein are now restrained by order of this Honorable Court from disposing of stock in American President Lines, Ltd., for which substantial offers have been received by the United States Maritime Commission for sums of money aggregating millions of dollars.

2. That the stock, being that of a corporation engaged in steamship operation, is liable to fluctuate, and was without substantial market value at a comparatively recent date, to wit: in the year 1938.

3. That said offers to buy were made more than 30 days ago, and that, in the opinion of affiant, if defendants be further restrained or prevented from accepting one of said offers and disposing of said stock the United States of America may suffer serious financial loss; and that in addition the Maritime Commission will, therefore, be hampered and impeded in the performance of its duties under the Merchant Marine Act, 1936, and other laws of the United States.

4. That the amount of damage which may be suffered by the United States of America, in the event of further restraint, cannot be accurately estimated in dollars and cents, but in the opinion of affiant a reasonable financial estimate of such damage which may be suffered exceeds the sum of Two Million Dollars.

And further deponent saith not.

Emory S. Land
EMORY S. LAND.

November 13, 1945.

CITY OF WASHINGTON,
District of Columbia, ss.

Emory S. Land, being duly sworn, says that he is one of the defendants in this case, that he has read the foregoing affidavit, and that all statements made therein are true and correct, save that allegations stated to be made upon information and belief he verily believes to be true and correct.

[SEAL] JENNIE G. ARONSTEIN,
Notary Public in and for the District of Columbia.

My Commission expires June 14, 1949.

734 In the District Court of the United States for the District of Columbia

Civil Action No. 31468

IN THE MATTER OF R. STANLEY DOLLAR (AN INDIVIDUAL), ET AL.

vs.

EMORY S. LAND (CHAIRMAN, UNITED STATES MARITIME COMMISSION), ET AL.

Affidavit

Filed, Nov. 15, 1945

CITY OF WASHINGTON,
District of Columbia, ss.

A. J. Williams, being first duly sworn, deposes and says:

1. That he is Secretary of the United States Maritime Commission.

2. That as shown by the records of the United States Maritime Commission the Commission since October 26, 1938, has delivered, or caused to be delivered, to American President Lines, Ltd., nine modern ships, the construction cost of which was approximately $35,733,426.86, and the construction-differential subsidy with respect to said ships which the Commission paid, or caused to be paid, from funds of the United States of America, pursuant to Title V of the Merchant Marine Act, 1936, was the sum of $16,315,059.40.

3. That since January 1, 1940, and pursuant to an operating-differential subsidy contract entered into under Title VI of the Merchant Marine Act, 1936, the Commission has paid, or caused to be paid, to American President Lines, Ltd. as operating-differen-

tial subsidy, and from funds of the United States of America, the sum of $5,636,936.08.

And further deponent saith not.

A. J. Williams.
A. J. Williams.

Subscribed and sworn to before me, the undersigned authority, this 14th day of November 1945.

[SEAL] Jennie G. Aronstein,
Notary Public.

My Commission expires June 14, 1949, in and for the District of Columbia.

735 In the District Court of the United States for the District of Columbia

Civil Action No. 31468

R. Stanley Dollar, et al., plaintiffs

v.

Emory S. Land, Chairman, United States Maritime Commission, et al, defendants

Affidavit of John F. Sonnett

Filed, Nov. 26, 1945

City of Washington,
District of Columbia, ss.

John F. Sonnett, being duly sworn, deposes and says:

I am the Assistant Attorney General of the United States in charge of this litigation on behalf of the defendants in this action.

In the course of preparing the defense of the suit, I have procured from the Commissioner of Internal Revenue photostatic copies of the joint income tax returns (Forms 1040) for the calendar year of 1938, of the following named individuals; and of the income and excess-profits tax return (Form 1120) for the calendar year of 1938, of the following named corporation, all of 311 California Street, San Francisco, California: H. M. and M. J. Lorber, R. Stanley Dollar and Esther J. Dollar, Dollar Steamship Line (California). Copies of these returns are attached hereto and made a part hereof.

The Court's attention is directed particularly to the following:

(1) Schedule F attached to the joint return of H. M. and M. J. Lorber, in which the following long-term loss, among others, from sales of capital assets is reported:

736 Kind of Property: 9,174 Shs. Dollar SS Line Inc., Ltd. Stock.
Date Acquired: 9/16/27.
Date Sold: 8/25/38.
Selling Price: Release of certain liabilities.
Cost: $128,444.31.
Gain or Loss: $128,444.31.
Gain or loss to be taken into account: 50%, Amount $64,222.15.

(2) Schedule F attached to the joint return of R. Stanley Dollar and Esther J. Dollar, in which the following long-term capital loss from sale of capital assets is reported:

"On August 15, 1938, there was entered into an 'Agreement Respecting Plan of Dollar Steamship Lines, Inc., Ltd', by and between the United States Maritime Commission, R. Stanley Dollar and others.

"The agreement provides, among other things, that R. Stanley Dollar will surrender and transfer all his right, title and interest in and to certain shares of Class 'A' Stock of Dollar Steamship Lines Inc., Ltd., which transfer was duly executed within the year 1938.

"The cost of the stock so surrendered is represented as follows:

	TOTAL				
Number of shares	35,803	13,760	7,630	513	14,000
Date acquired		Year 1929	Year 1929	Year 1933	Year 1930
Date transferred		8/15/38	8/15/38	8/15/38	8/15/38
Gross sales price	-	Nil	Nil	Nil	Nil
Cost	295,697.51	141,942.10	140,930.41	12,825.00	Nil
Loss	295,697.51	141,942.10	140,930.41	12,825.00	Nil

737 (3) Schedule I attached to the corporation income and excess-profits tax return of Dollar Steamship Line (California), in which the following information is reported as "Bad Debts":

Security	Number shares	Date acquired	Cost
Class B Stock Dollar S. S. Lines, Inc., Ltd	1,872,210	1929	$2,456,406.26
Class A Stock Dollar S. S. Lines, Inc., Ltd	2,075	1938	
Class A Stock Dollar S. S. Lines, Inc., Ltd	237,760	1938	1,415,972.24
Total cost			3,872,378.50
Management contract valued at $4.00 written off-cancelled			1.00
			3,872,379.50

Cost of stock acquired 1938 allocated on following basis:

Written off upon transfer free and clear to U. S. Maritime Commission under agreement dated August 15, 1938 and supplement

dated August 19, 1938—See "Agreement respecting Adjustment Plan of Dollar Steamship Lines, Inc., Ltd."

"Agreement dated July 18, 1938, accepted offer of The Robert Dollar Co. to give Dollar Steamship Line (Cal.) 227,790 shares class B capital stock Dollar Steamship Lines, Inc., Ltd., and 2,075 shares class A stock Dollar Steamship Lines, Inc., Ltd.; together with all office furniture equipment, furnishings and fixtures now located in the leased offices now used and occupied by Dollar Steamship Lines, Inc., Ltd., together with all automobiles used in the business of Dollar Steamship Lines, Inc., Ltd., and to give a termination and cancellation of that certain management agreement between Dollar Steamship Line (Calif.) and The Robert Dollar Co., dated June 23, 1926, in return for:

"Payment and satisfaction in full of that certain demand note executed by the Robert Dollar Co. in favor of Dollar Steamship Lines, Ltd., (Hong Kong) dated March 1, 1938, for the principal sum of $1,515,973.24, as well as release from liability under agreement between Dollar Steamship Lines, Inc., Ltd., and Matson Navigation Co., dated April 23, 1930 and mutual releases by Dollar Steamship Line (Cal.) and The Robert Dollar Co. from any and all liabilities each to the other.

38 Note of The Robert Dollar Co. in favor of Dollar Steamship Lines, Ltd., (Hong Kong)—Cancelled		$1,515,973.24
227,790 shares class B and 2,075 shares class A stock of Dollar Steamship Lines, Inc., Ltd	$1,415,972.24	
Office equipment, furniture, furnishings and fixtures and automobiles received	100,000.00	
Cancellation of management agreement between Dollar Steamship Line (Cal.) and The Robert Dollar Co	1.00	
Note cancelled		1,515,973.24
Stocks and other consideration received	1,515,973.24	

John F. Sonnett.
JOHN F. SONNETT.

Subscribed and sworn to before me this 26th day of November 1945.

GLADYS E. MCGAFFEY,
Notary Public.

My Commission expires 9/30/48.
Copy received Nov. 26, 1945.

CLINTON M. HESTOR,
By W. E. KOHEN,
Counsel for Plaintiffs.

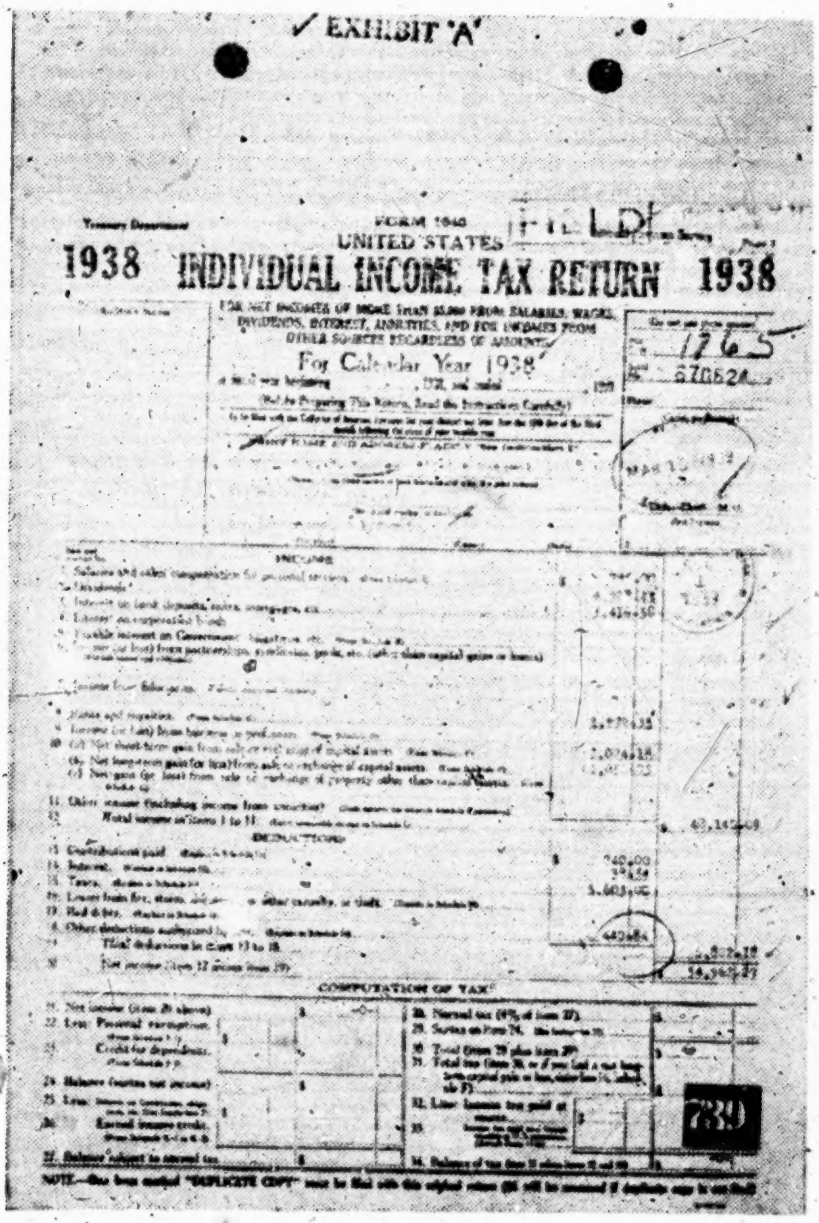


EXHIBIT 'A'

Treasury Department

FORM 1040

UNITED STATES

1938 INDIVIDUAL INCOME TAX RETURN 1938

FOR NET INCOMES OF MORE THAN $5000 FROM SALARIES, WAGES, DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM OTHER SOURCES REGARDLESS OF AMOUNT

For Calendar Year 1938

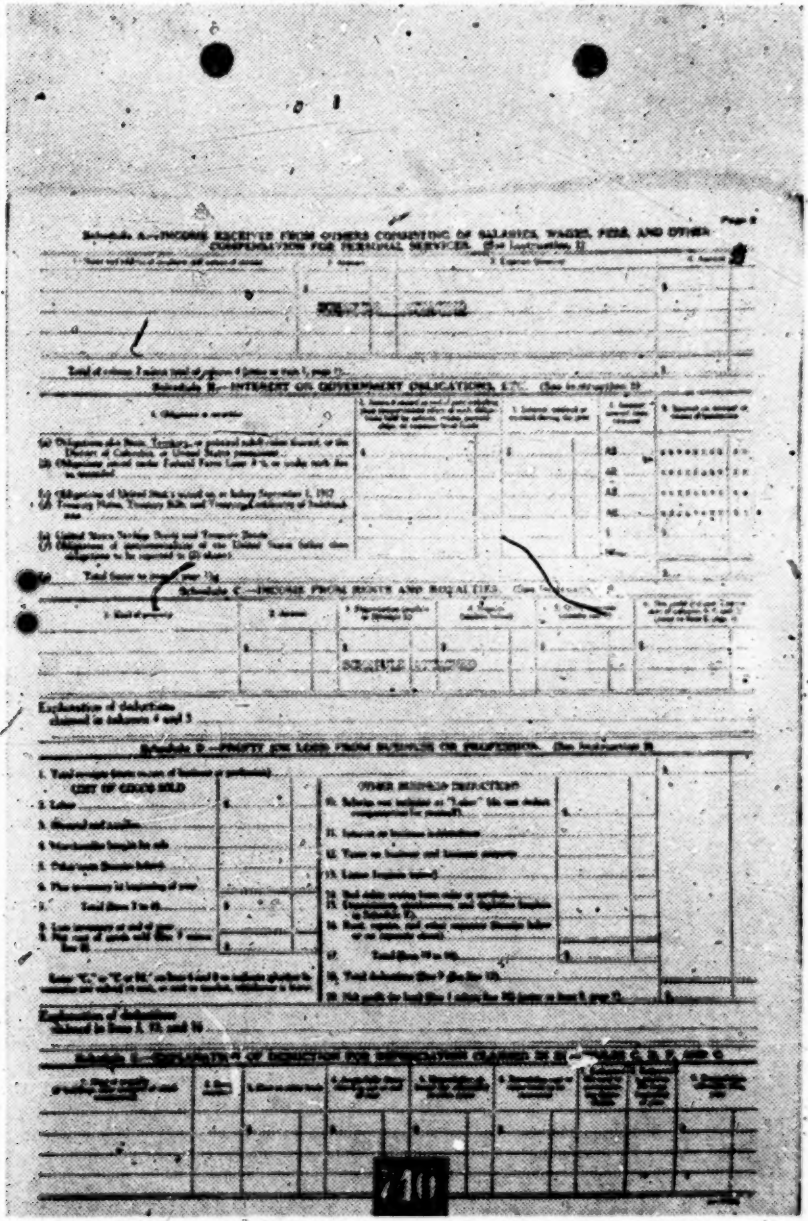
1065

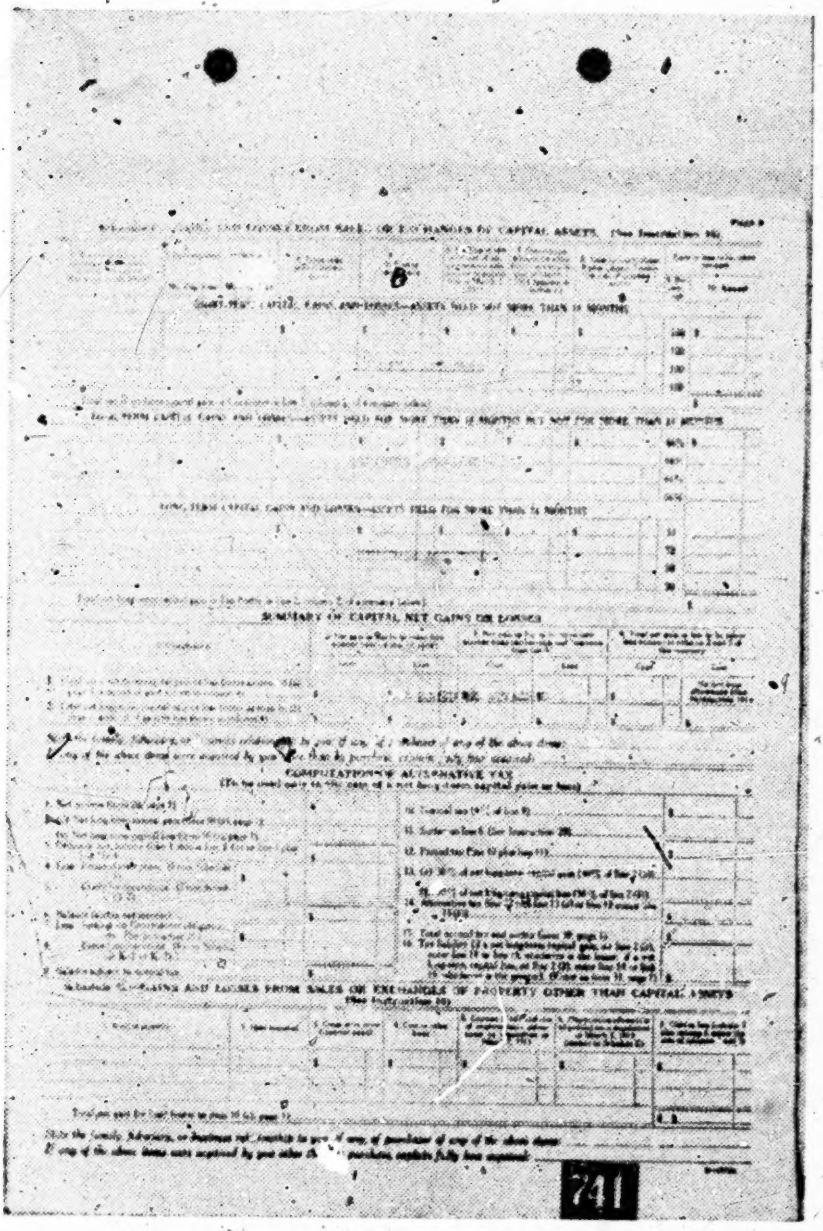
INCOME

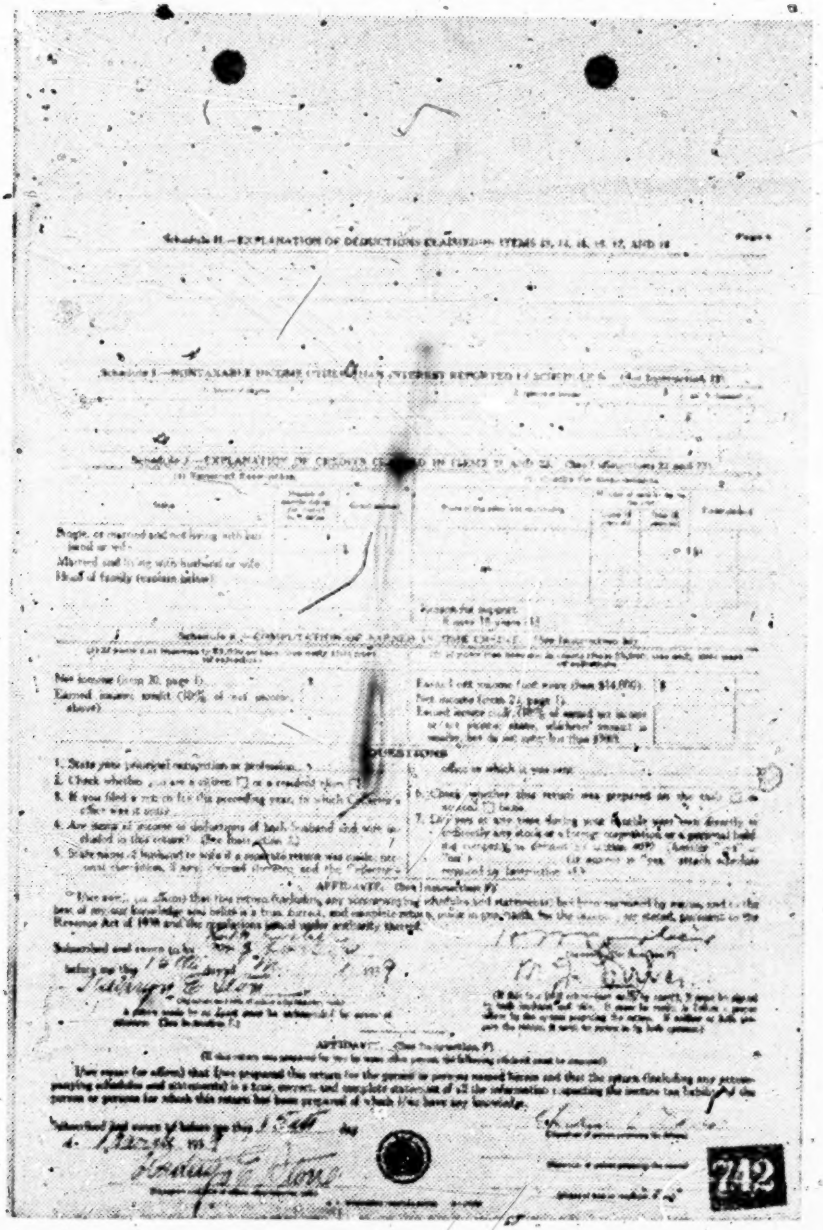
DEDUCTIONS

COMPUTATION OF TAX

NOTE—One form marked "DUPLICATE COPY" must be filed with the original return (it will be examined if duplicate copy is not filed)




SUMMARY OF CAPITAL NET GAINS OR LOSSES
COMPUTATION OF ALTERNATIVE TAX
741



Schedule H.—EXPLANATION OF DEDUCTIONS EXAMINED ON ITEMS 13, 14, 15, 16, 17, AND 18

Schedule I.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 21 AND 22

Single, or married and not living with husband or wife

Married and living with husband or wife

Head of family (explain below)

Net income (item 20, page 1)

Earned income credit (10% of net income above)

Earned net income (not more than $14,000)

Net income from 2c, page 1)

Earned income credit (10% of earned net income or net income shown, whichever amount is smaller, but not more than $300)

QUESTIONS

1. State your principal occupation or profession.

2. Check whether you are a citizen ☐ or a resident alien ☐

3. If you filed a return for the preceding year, to which collector's office was it sent?

4. Are items of income or deductions of husband and wife included in this return? (See instruction 5.)

5. State name of husband or wife if a separate return was made, the amount thereof, if any, claimed as exemption, and the reasons

6. Check whether this return was prepared on the cash ☐ or accrual ☐ basis.

7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation, or a personal holding company, as defined in section 407? (See instruction 7.) If answer is "Yes," attach schedule required by instruction 7.

AFFIDAVIT. (See instruction 19.)

I (We each) do (does) that this return (including any accompanying schedules and statements) has been examined by me (us), and is (are) to the best of my (our) knowledge and belief a true, correct, and complete return, made in good faith for the taxable year stated, pursuant to the Revenue Act of 1936 and the regulations issued under authority thereof.

Subscribed and sworn to before me this 15th day of March, 1937

Notary Public

(If this is a joint return of husband and wife, it must be signed by both husband and wife. If made by agent, power of attorney must be filed with the collector. If return is made by a fiduciary, proper evidence of his appointment must be furnished.)

AFFIDAVIT. (See instruction 19.)

(If the return was prepared for the person by some other person, the following should be executed)

I (We each) do (does) that I (we) prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information appearing therein to the best of the knowledge of the person or persons for whom this return has been prepared of which I (we) have any knowledge.

Subscribed and sworn to before me this 15th day of March, 1937

Notary Public

742

743 H. M. & M. J. LORBER FEDERAL INCOME TAX RETURNS 1938

SALARIES AND OTHER COMPENSATION

Schedule A—Item 1

Directors' Fees:

Dollar Steamship Lines Inc., Ltd.	$ 25.00
Dollar Steamship Line (California)	280.00
American Mail Line	200.00
Admiral Oriental Line	140.00
Robert Dollar Co.	50.00
Dollar Terminal S. S. Co.	100.00
Pacific S. S. Lines Ltd.	20.00
	795.00

744 Rents—Item

College Avenue Property		$2,219.80	
Repairs	$236.81		
Insurance	70.00		
Depreciation 2% on $10,000.00	200.00		
		506.81	1,712.99
Alameda Property:			
Repairs	66.00		
Depreciation 5% on $4,500.00	225.00		
		291.14	197.36
			62.00
			1,972.35

CONTRIBUTIONS

First Church San Mateo	720.00
Red Cross	20.00
	740.00

INTEREST

On additional Federal Tax:	
M. J. L.	37.62
H. M. L.	.72
	38.34

745 Schedule "D"

SHORT TERM CAPITAL GAINS AND LOSSES—LESS THAN 18 MONTHS

Kind of property	Date acquired	Date sold	Selling price	Cost	Gain or loss	Percent	Gain or loss to be taken into account, amount
100 shares Standard Oil Ind	12/2/37	1/19/38	$3,372.24	$3,295.50	$76.74	100	$76.74
25 shares American Can	12/2/37	2/23/38	2,247.87	2,157.93	89.94	100	89.94
300 shares Houston Oil	12/16/37	2/25/38	2,527.46	2,067.60	459.86	100	459.86
100 shares Southern Pacific Ry	3/28/38	6/6/38	1,089.47	1,094.00	4.53	100	4.53
100 shares Southern Pacific Ry	3/30/38	7/22/38	2,024.95	978.80	1,046.15	100	1,046.15
3M shares Southern Pacific Ry	6/7/38	11/3/38	1,602.44	1,189.70	412.74	100	412.74
50 shares American Tobacco	9/24/37	10/13/38	4,464.59	3,546.94	917.65	100	917.65
75 rights Phillip's Petroleum	8/19/38	8/19/38	25.63		25.63	100	25.63
Total net short term capital gain			17,354.65	14,330.47			3,024.18
18 TO 24 MONTHS							
5M Great Northern Ry 5s	4/23/36	1/6/38	$5,114.21	$3,606.12	$491.91	66⅔	$327.94
OVER 24 MONTHS							
100 shares American Cyanamid B	7/3/35	3/16/38	$2,272.80	$2,167.83	$104.97	30	$52.98
100 shares Continental Oil	7/5/33	5/23/38	2,425.70	1,895.36	630.34	30	310.17
4M shares Sansom Tire & Rubber Co. 6½	12/23/31	12/31/38	4,000.00	2,040.00	1,960.00	50	980.00
House and lot, 3003 Jackson St., Alameda	Sept. 1929	Jan. 1938	7,755.95	4,459.93	3,295.18	50	1,647.56
Lot 16 Claremont Park, Berkeley, Calif	12/28/27	11/25/38	2,611.50	2,800.20	194.70	50	97.35
9174 shares Dollar S. S. Line, Inc., Ltd. stock	9/16/27	9/25/38	Release of certain liabilities	128,444.31	128,444.31	50	64,222.15
						30	
			19,065.95	141,728.63	122,658.38		61,656.73

746

Taxes Item 15

City & County S. F.	$315.65
San Mateo City	1,042.87
San Mateo County	2,573.62
City of Piedmont	209.74
Alameda County	855.12
Town of Hillsborough	124.28
City of Alameda	36.32
City of Berkeley	24.58
Sonoma County	38.60
California State Income Tax H. M. L.	178.81
California State Income Tax M. J. L.	171.31
California State Auto Tax (Licences)	32.10
	5,603.00

Other Deductions Item 19

Investment Counsel	440.84

EXHIBIT "B"

FORM 1040
UNITED STATES

1938 INDIVIDUAL INCOME TAX RETURN 1938

FOR NET INCOMES OF MORE THAN $5,000 FROM SALARIES, WAGES, DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1938

REVIEWED
By A. C. Thom
DATE 3-10-1939

PRINT NAME AND ADDRESS PLAINLY

R. Stanley Dollar and Esther F. Dollar
311 California Street
San Francisco, San Francisco, California

INCOME

1. Salaries, wages, other compensation for personal services		17,820 00
2. Dividends		35,007 42
3. Interest on bank deposits, notes, mortgages, etc		4,738 10
4. Interest on corporate bonds		175 00
5. Taxable interest on Government obligations, etc		
6. Income (or loss) from partnerships, syndicates, pools, etc (other than capital gains or losses)		
[illegible] Beverly Hills, Calif.		2,217 42
[illegible], San Francisco, Calif.		4,022 42
7. Income from fiduciaries		
8. Rents and royalties		
9. Income (or loss) from business or profession		3,842 28
10. (a) Net short-term gain from sale or exchange of capital assets		22 20
(b) Net long-term gain (or loss) from sale or exchange of capital assets		173,348 75
(c) Net gain (or loss) from sale or exchange of property other than capital assets		
11. Other income (including income from annuities, [illegible] profit from installment sale		547 03
12. Total income in items 1 to 11		389,343 12

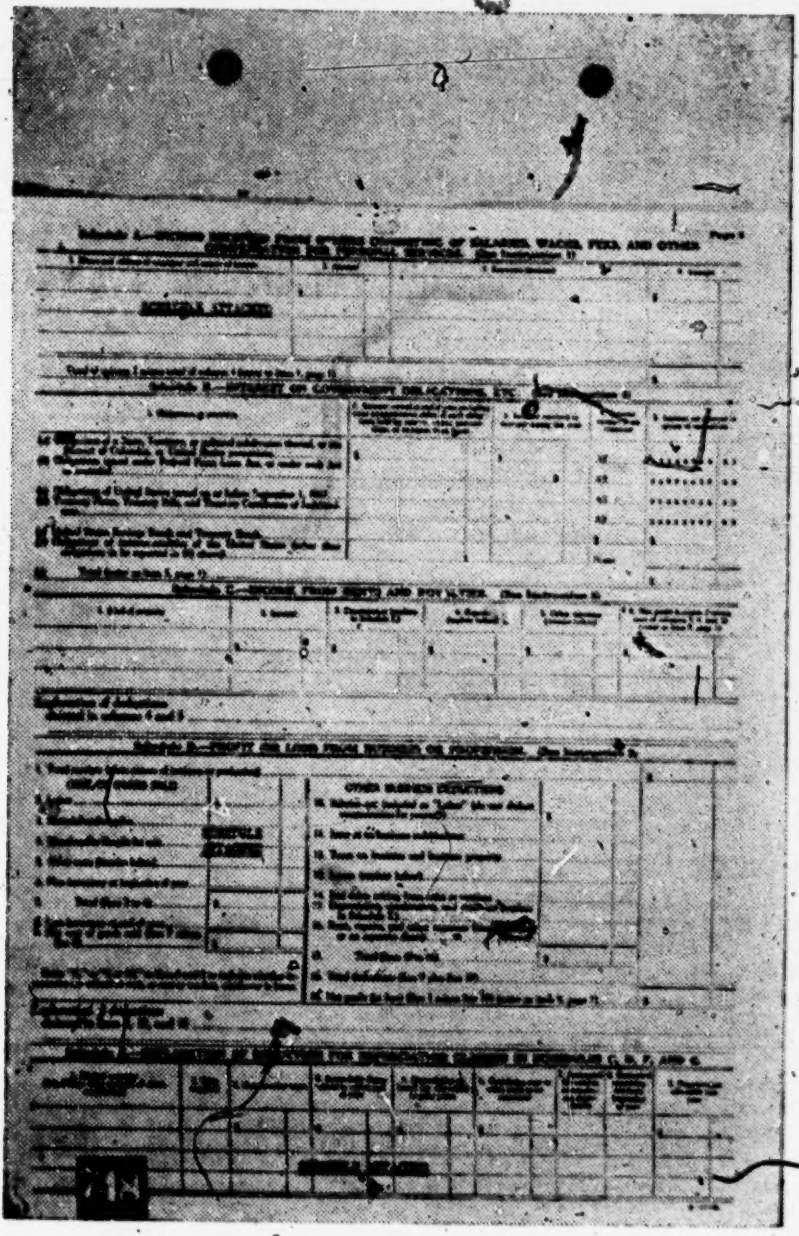
DEDUCTIONS

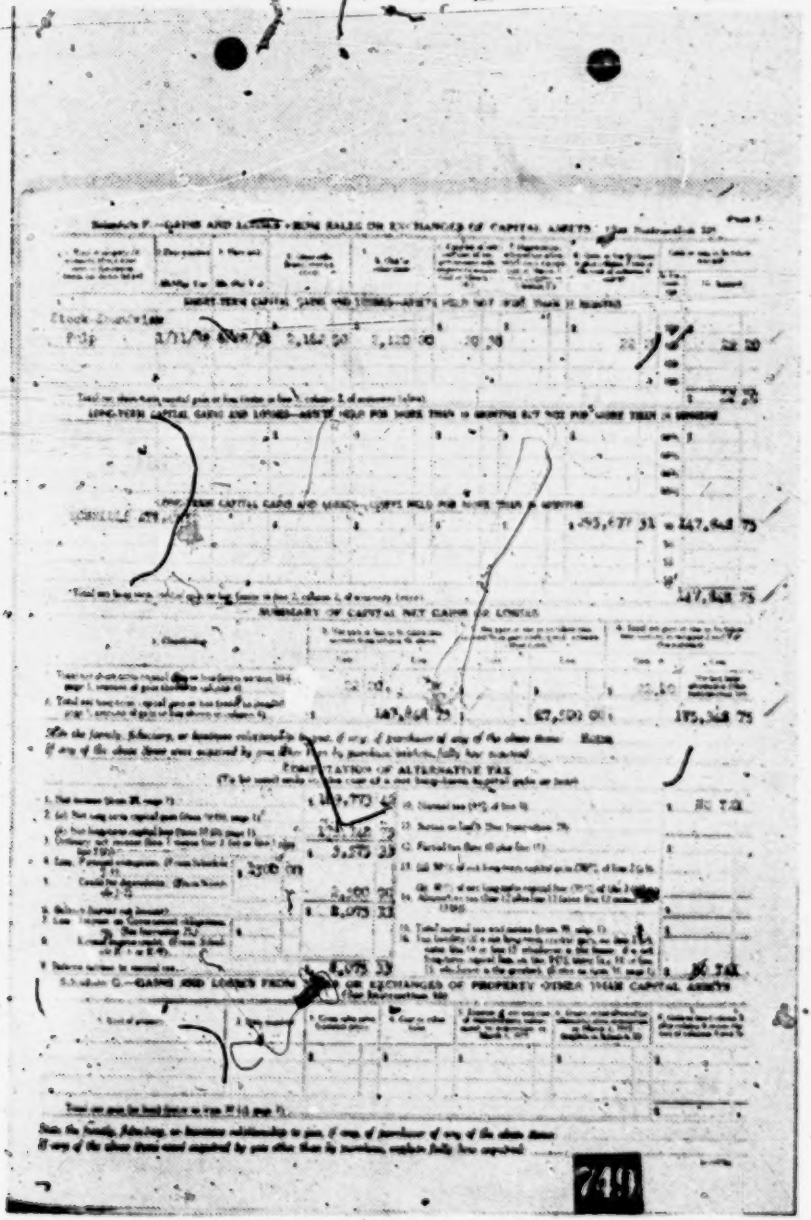
13. Contributions paid		(773 28)
14. Interest		2,583 42
15. Taxes		6,860 92
16. Losses from fire, storm, ship wreck, or other casualty, or theft		
17. Bad debts		
18. Other deductions authorized by law		
19. Total deductions in items 13 to 18		10,670
20. Net income (item 12 minus item 19)		389,772 42

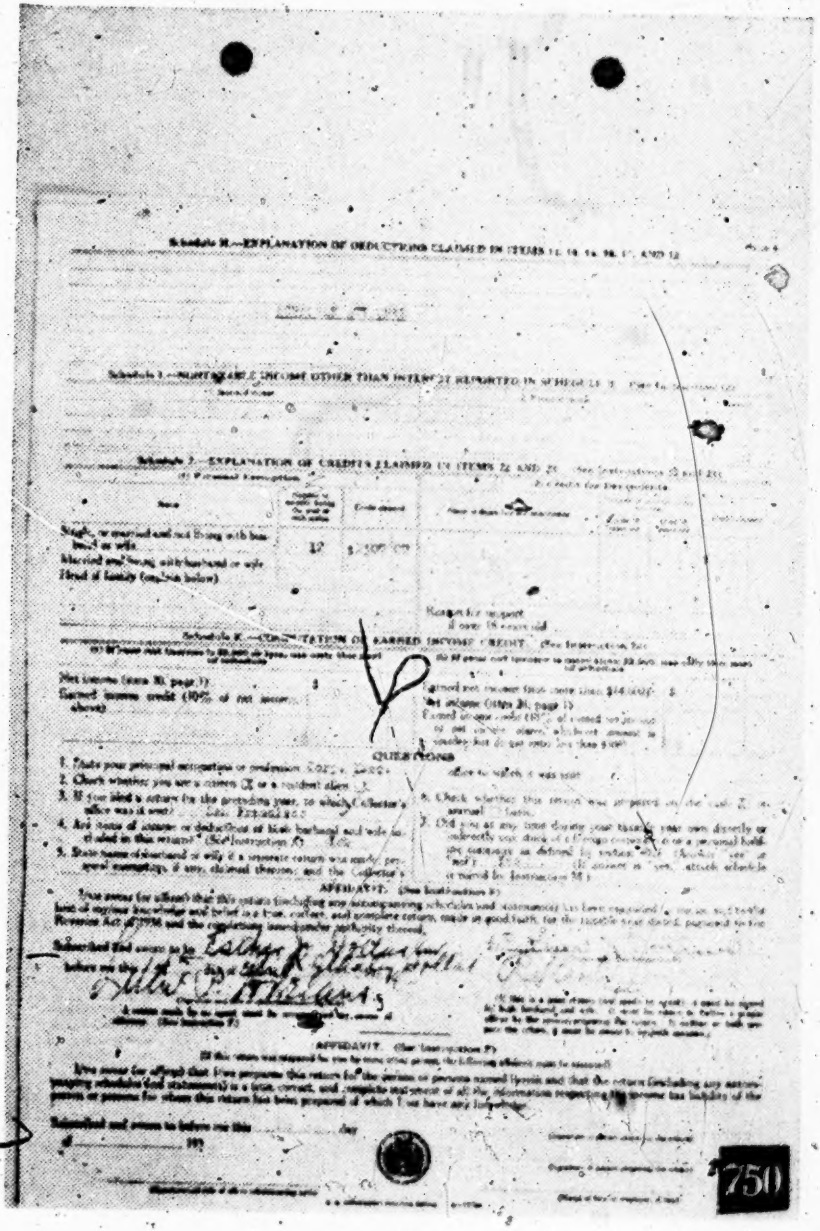
COMPUTATION OF TAX

21. Net income (item 20 above)	$ 389,772 42	29. Normal tax (4% of item 27)		NO TAX
22. Less: Personal exemption	$2500 00	30. Surtax on item 24		
23. Credit for dependents	2,500 00	31. Total (item 29 plus item 30)		
24. Balance (surtax net income)	$ 387,272 42	32. Total tax (item 31, or if you had a net long-term capital gain or loss, enter line 4, Schedule D)		
25. Less: Interest on Government obligations, etc		33. Less: Income tax paid at source		.747
26. Earned income credit		34.		
27. Balance subject to normal tax	$ 387,272 42	35. Balance of tax (item 32 minus items 33 and 34)		NO TAX

NOTE.—One form marked "DUPLICATE COPY" must be filed with this original return (It will be returned if duplicate copy is not filed)







Schedule H.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS

Schedule J.—MAINTENANCE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 24 AND 25

Name

Single, or married and not living with husband or wife

Married and living with husband or wife

Head of family (explain below)

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT

Net income (item 30, page 1)

Earned income credit (10% of net income above)

QUESTIONS

1. State your principal occupation or profession
2. Check whether you are a citizen or a resident alien
3. If you filed a return for the preceding year, to which Collector's office was it sent?
4. Are terms of income or deductions of husband and wife included in this return? (See Instruction 5)
5. State name of husband or wife if a separate return was made, period covered, if any, the total income, and the Collector's

6. Check whether this return was prepared on the cash or accrual basis
7. Did you at any time during your taxable year own directly or indirectly voting stock of a foreign corporation or a personal holding company as defined by section

AFFIDAVIT. (See Instruction 6)

I (or we) swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me (or us) and is to the best of my (our) knowledge and belief a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1936 and the regulations issued under authority thereof.

Subscribed and sworn to before me this

AFFIDAVIT. (See Instruction 7)

If this return was prepared for the taxpayer by any person other than a deputy of the Commissioner, the following affidavit must be executed:

I (or we) swear (or affirm) that I (or we) prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax liability of the person or persons for whom this return has been prepared of which I (or we) have any knowledge.

Subscribed and sworn to before me this

750

751 R. STANLEY DOLLAR AND ESTHER J. DOLLAR 1938 INCOME TAX RETURN

Schedule F—Long Term Capital Loss:

On August 15, 1938, there was entered into an "Agreement Respecting Plan of Dollar Steamship Lines, Inc., Ltd.," by and between the United States Maritime Commission, R. Stanley Dollar and others.

The agreement provides, among other things, that R. Stanley Dollar will surrender and transfer all his right, title, and interest in and to certain shares of Class "A" Stock of Dollar Steamship Lines, Inc., Ltd., which transfer was duly executed within the year 1938.

The cost of the stock so surrendered is represented as follows:

	TOTAL				
Number of shares	35,893	13,760	7,620	513	14,000
Date acquired		Year 1929	Year 1929	Year 1933	Year 1930
Date transferred		8/15/38	8/15/38	8/15/38	8/15/38
Gross sales price		Nil	Nil	Nil	Nil
Cost	295,697.51	141,942.10	140,930.41	12,825.00	Nil
Loss	295,697.51	141,942.10	140,930.41	12,825.00	Nil

752 Schedule A—Salaries and Other Compensation:

Olympic Refining Company, Long Beach—		
Salary	$12,000.00	
Less: Unemployment Insurance	150.00	
		$11,850.00
Dollar Steamship Lines, San Francisco—Director's Fees		550.00
American Mail Line, San Francisco—Director's Fees		200.00
Admiral Oriental Line, San Francisco—Director's Fees		140.00
Pacific Steamship Lines, San Francisco—Director's Fees		60.00
The Roberts Dollar Co., San Francisco—Director's Fees		20.00
		12,820.00

753 Item No. 2—Dividends:

Estand, Inc., San Francisco	87,000.00
Dollar Investment Co., San Francisco	7,500.00
Crown Zellerbach Co.	180.00
Texas Co.	116.00
Todd Shipbuilding Co.	400.00
Tidewater Associated Oil Co.	11.25
	15,207.25

754 Schedule D—Income (or Loss) From Business:

Dinero Dairies Operations

Income:	
United States Treasurer—a/c performance of soil building practice under Agricultural Conservation Program	$745.57
Rent	500.00
Sugar Beets	139.49
Miscellaneous	174.00
	1,559.06

Expenses:		
Sacramento County Taxes	$745.19	
Interest	1,132.62	
Miscellaneous	146.10	
Labor	1,377.47	
Utilities	95.15	
Depreciation	1,884.81	
		5,381.34
		3,822.28

755 Item 11—Profit From Installment Sales:

Description	Lot #17, Block #3, Lakeshore Highlands
Costs	$1,577.85.
Sales Price	$2,650.00.
Profit	$1,072.15.
% of Profit	40.46.
Collections 1938	$1,352.03.
Realized Profits	$547.03.

756 Schedule H—Contributions:

Community Chest of Oakland	350.00
Southern Bible Training School, Dallas, Texas	1,200.00
St. Paul's Church, Oakland, Calif	780.00
Mission Immanuel, Berkeley, Calif	1,800.00
Western Book & Tract Co.—Tract Fund	2,572.80
Miracle Book Club, Richmond, Calif	900.00
Camp Fire Girls' Assn	5.00
	7,607.80
Less: Amount in excess of 15% of Net Income Computed in Accordance With Sec. 23 (o) of the Revenue Act of 1938	6,627.84
	979.96

Schedule H—Interest:

Anglo California National Bank, San Francisco	1,586.07
Bank of America	4.63
Collector of Internal Revenue	425.64
California State Treasurer	2.92
Laura J. Knight	570.16
	2,589.42

Schedule H—Taxes:

Auto License Fees and Registration	81.40
California Personal Income Tax	968.13
County of Alameda—Property Tax	2,513.05
City of Oakland & County of Alameda—Property Tax	225.55
City of Piedmont, Calif.—Property Tax	1,460.24
Placer County, Calif.—Property Tax	1,211.16
Coos County, Oregon	6.57
Duty on Import Shipments	133.36
Stock Transfer Tax	69.44
Taxes on Club Dues	162.02
U. S. Forestry Service	30.00
	6,860.92

DINERO DAIRIES PROPERTY

Schedule of Depreciation Calendar Year 1938

Farm buildings (frame construction)	Date acquired	Estimated life from date acquired	Estimated remaining life from beginning of year	Cost	Accrued depreciation 12/31/37	Depreciation year 1938	Accrued depreciation 12/31/38	Depreciation 12/31/38
Dwelling houses, bunk houses, dairy house, dairy barns, feed barn, hay house outbuildings, etc.	10/31/33	10 years	5⅚ Years	$17,098.07	$7,124.21	$1,709.81	$8,834.02	$8,264.05
Milk barn No. 2	10/31/33	24⅙ years	20 years	501.18	85.11	20.89	105.91	395.27
Total farm buildings				17,599.25	7,209.32	1,730.61	8,939.93	8,659.32
Fences and corrals	10/31/33	10 years	6 years	381.50	158.96	38.15	197.11	184.39
Trucks and tractors:								
Chevrolet truck	10/31/33	2⅛ years		86.70	86.70		86.70	
Tractor	10/31/33	2⅛ years		60.69	60.69		60.69	
Lighting system for tractor	7/15/35	7 months		62.78	62.78		62.78	
International truck	3/13/35	6 years	3 years	238.00	115.38	41.33	156.71	81.29
Total trucks and tractors				458.17	325.55	41.33	366.88	91.29
Farm machinery and equipment	10/31/33	12 years	7 years	121.30	42.16	10.12	52.28	69.11
	10/31/33	13 years	8 years	69.36	22.25	5.34	27.59	41.77
	1934	14²⁷ years	11 years	343.38	84.14	24.04	108.18	235.20
	1935	14³⁴ years	12 years	30.00	5.25	2.10	7.35	22.65
	1936	do	12³⁷ years	473.09	56.24	33.12	99.36	373.73
Total farm machinery and equipment				1,037.32	220.04	74.72	294.76	742.46
Total depreciable property				19,476.14	7,913.87	1,884.81	9,798.68	9,677.46
Add: Cost of land				68,478.99				68,478.99
Total, December 31, 1938				87,955.13	7,913.87	1,884.81	9,798.68	78,156.45

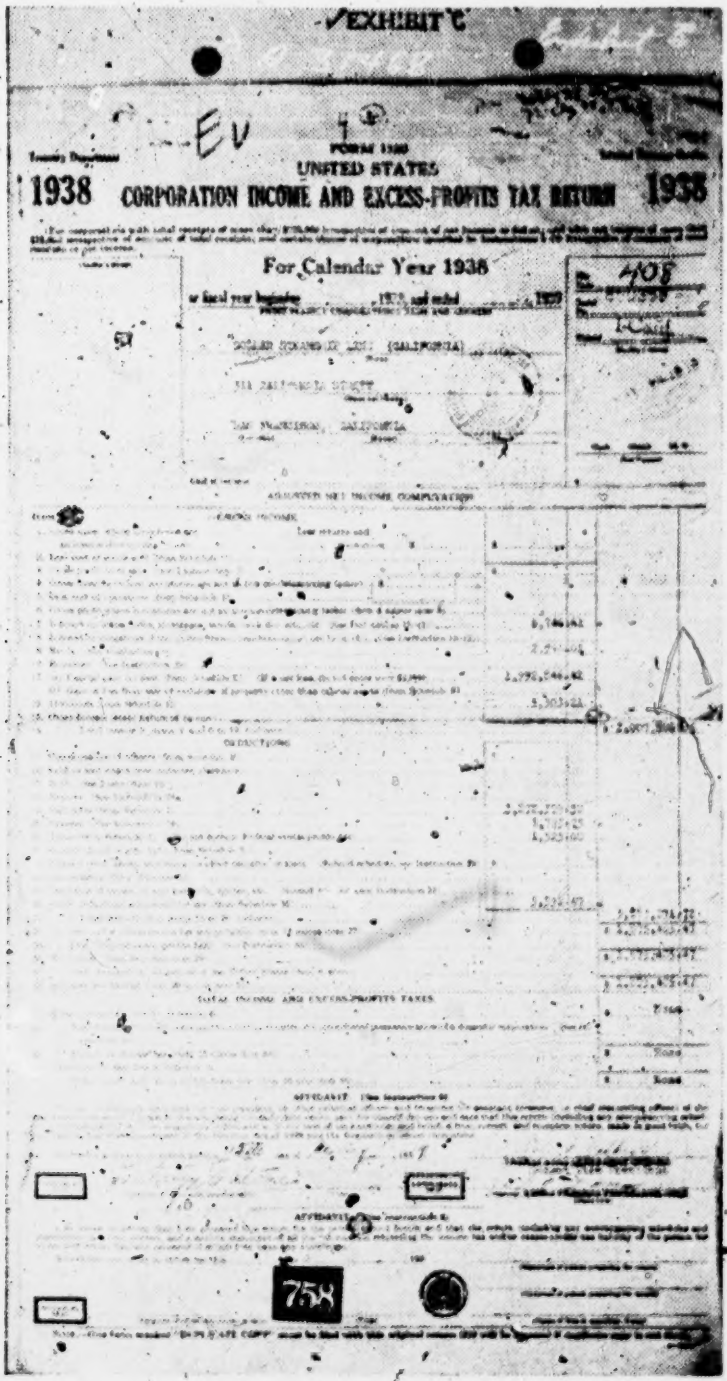


EXHIBIT C

FORM 1120

UNITED STATES

1938 CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN 1938

For Calendar Year 1938

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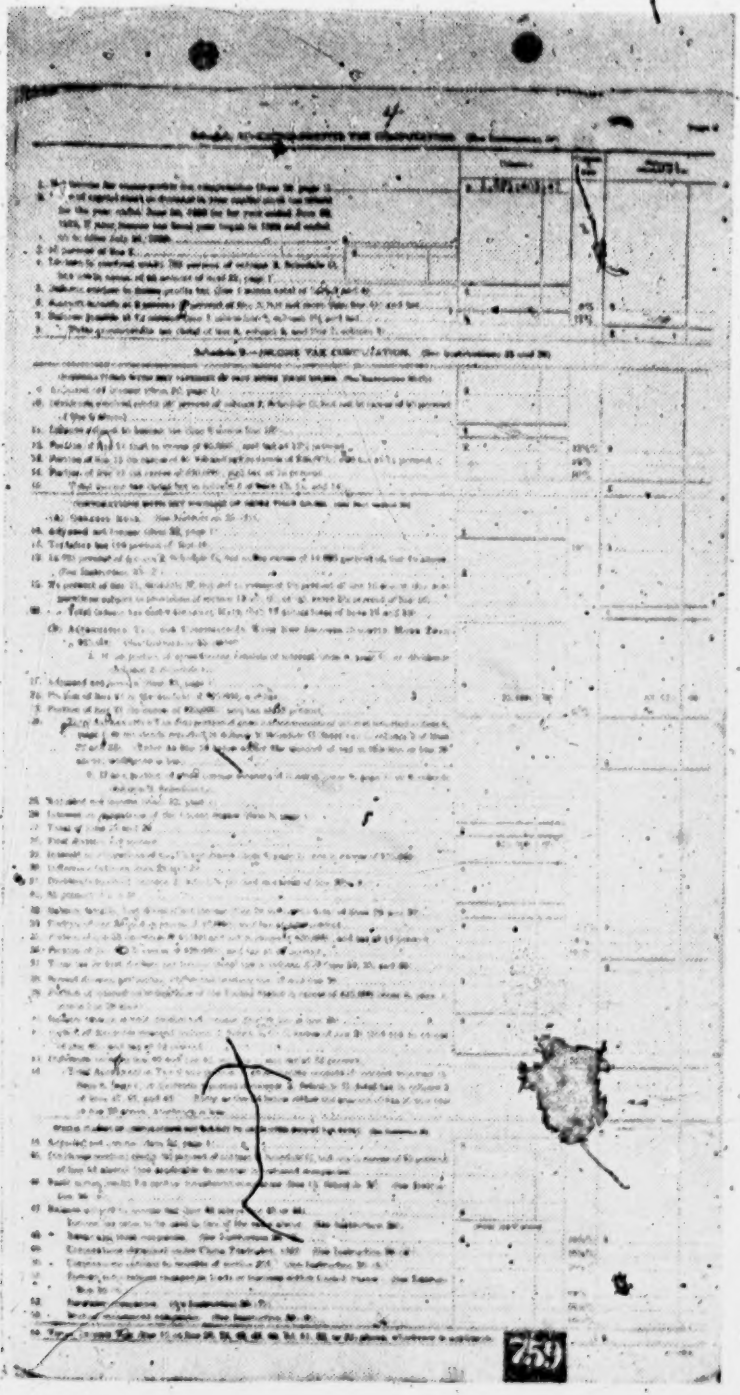

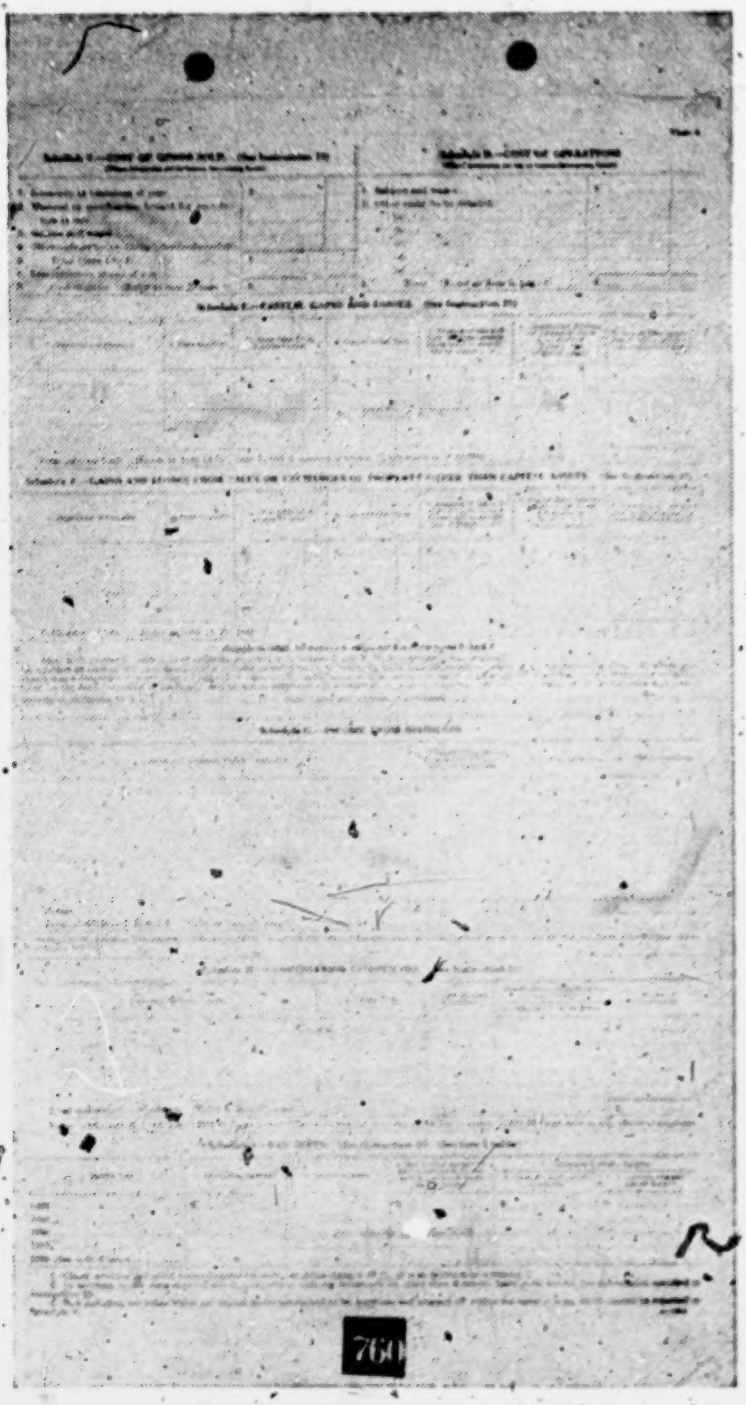

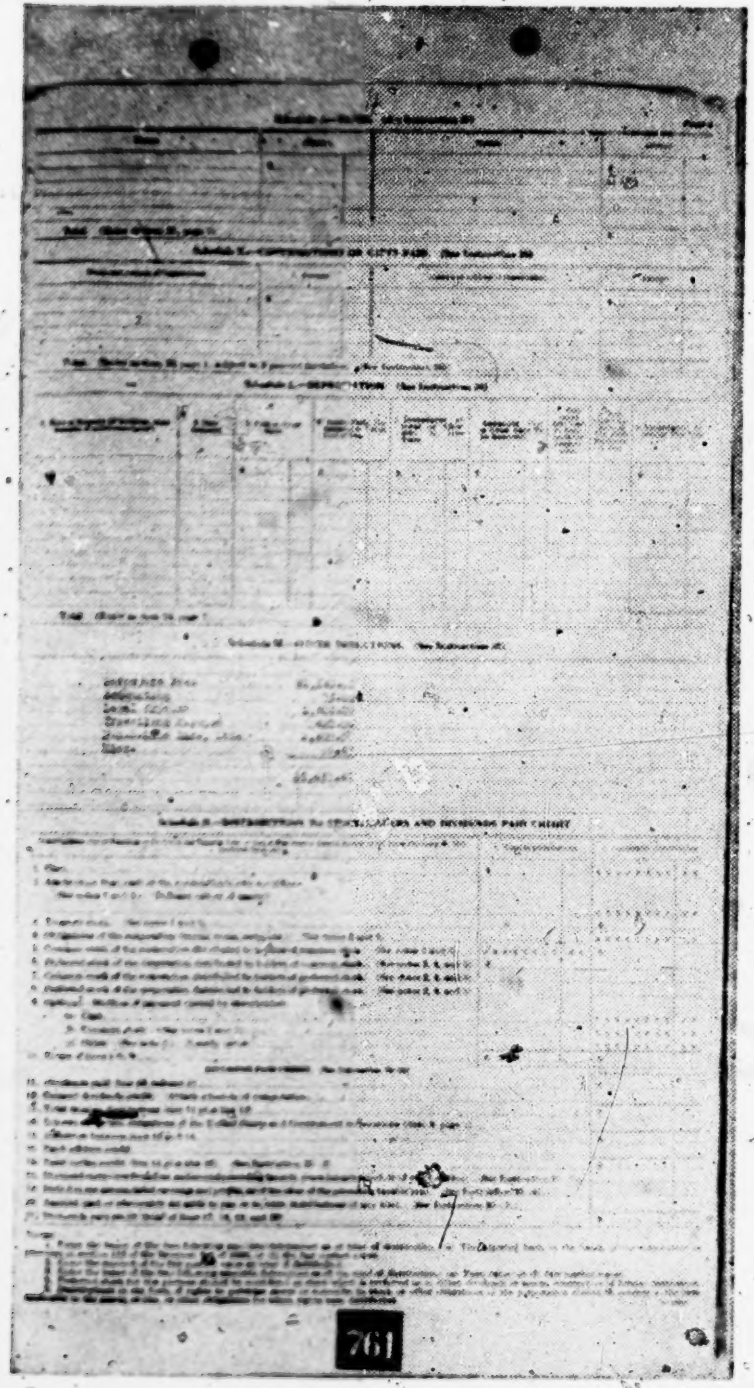

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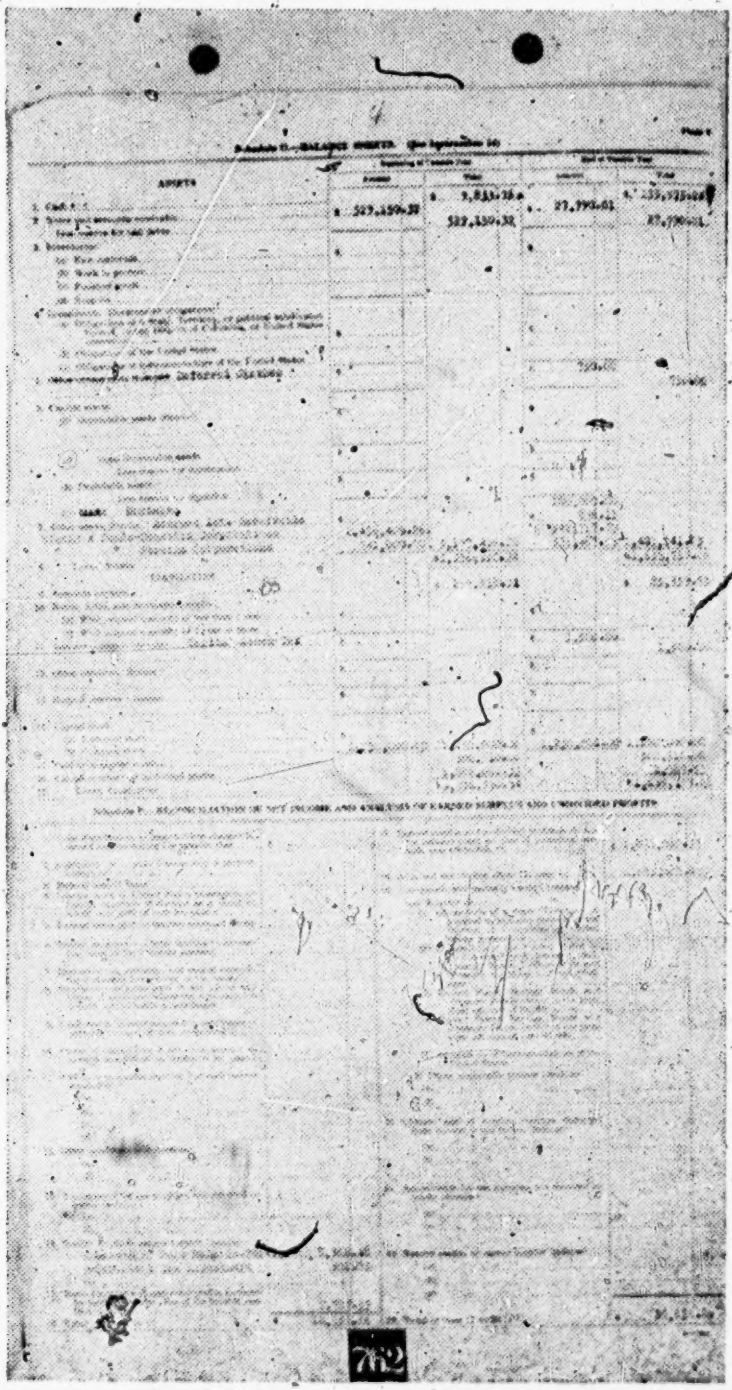

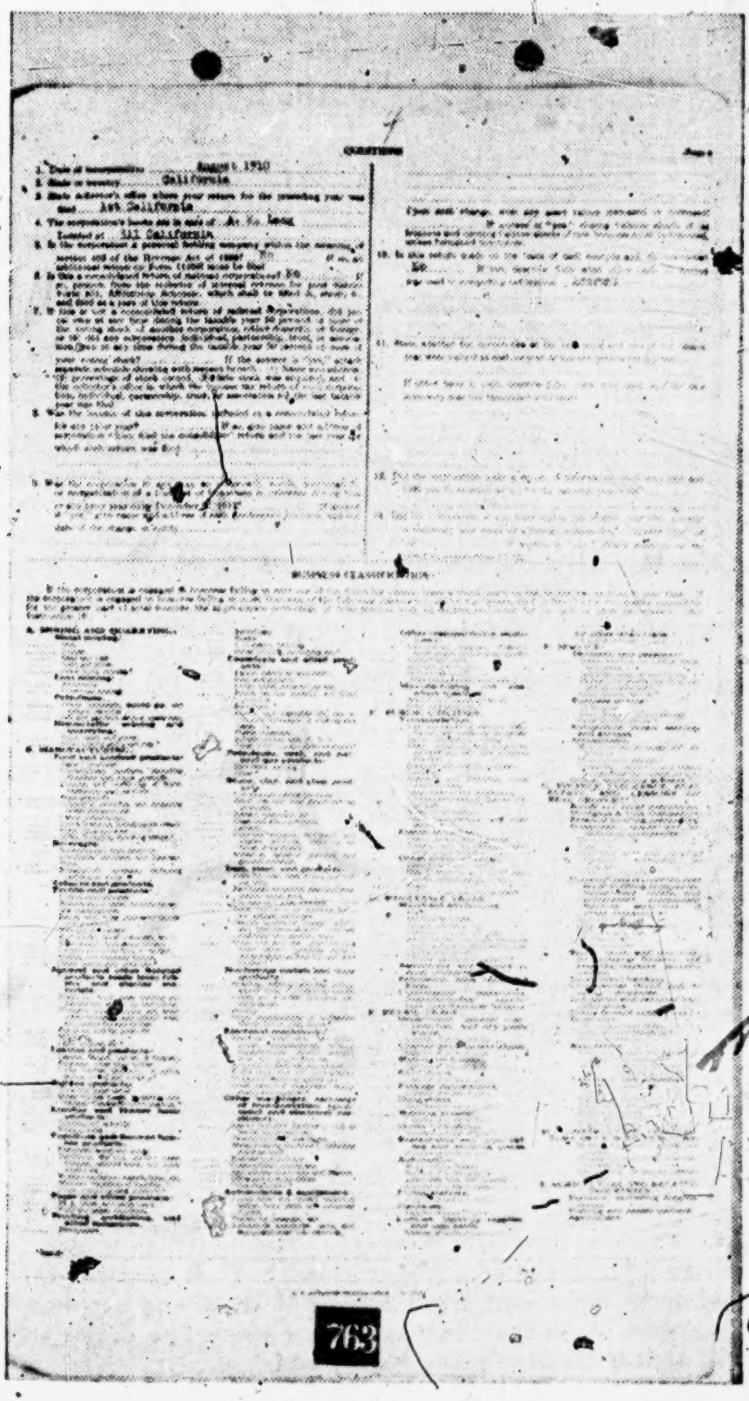

763

764 DOLLAR STEAMSHIP LINE (CALIFORNIA) 1938 INCOME TAX RETURN

Schedule E—Capital Gain or Loss

Profit realized per Books on Liquidation and dissolution of wholly owned subsidiary, Dollar SS Lines, Ltd		*$1,989,783.15
Less: Undistributed income Foreign Personal Holding Company (Dollar SS Lines, Ltd., Hong Kong) taken into income for 1938		5,303.21
		1,984,479.94
Add: Undistributed income Foreign Personal Holding Company (Dollar SS Lines, Ltd., Hong Kong) taken as loss for 1937		8,366.48
Net Profit		1,992,846.42

See form 958 filed for 1937 & 1938 Annual Information Return Foreign Personal Holding Company.

*Cost per Books	$741,000.00	
Liquidation Value Realized	2,730,783.15	
Profit	1,989,783.15	

	Cost	Yr. Acq.	Sale Price
Furniture, Fixtures, Furnishings, etc.	$100,000.00	1938	$100,000.00

765 Schedule I Bad Debts

Security	Number shares	Date acquired	Cost
Class B Stock Dollar S. S. Lines Inc., Ltd	1,872,210	1929	$2,456,406.26
Class A Stock Dollar S. S. Lines Inc., Ltd	2,075	1938	1
Class A Stock Dollar S. S. Lines Inc., Ltd	227,790	1938	1 1,415,972.24
Total cost			3,872,378.50
Management contract valued at $1.00 written off—cancelled			1.00
			3,872,379.50

[1] Cost of Stock acquired 1938 allocated on following basis:

Agreement Dated July 18, 1938, accepted offer of The Robert Dollar Co. to give Dollar Steamship Lines 227,790 shares class B capital stock Dollar Steamship Lines, Inc., Ltd. and 2,075 shares class A stock Dollar Steamship Lines, Inc., Ltd., together with all office furniture equipment, furnishings, and fixtures now located in the leased offices now used and occupied by Dollar Steamship Lines, Inc., Ltd., together with all automobiles used in the business of Dollar Steamship Lines, Ltd., and to give a termination and cancellation of that certain maangement agreement between Dollar Steamship Line (Calif.) and The Robert Dollar Co., dated June 23, 1926, in return for:

Payment and satisfaction in full of that certain demand note executed by the Robert Dollar Co. in favor of Dollar Steamship Lines, Ltd., (Hong Kong) dated March 1, 1938, for the principal sum of $1,515,973.24, as well as release from liability under agreement between Dollar Steamship Lines, Inc., Ltd., and Matson Navigation Co., dated April 23, 1930 and mutual releases by Dollar Steamship Line (Cal.) and The Robert Dollar Co. from any and all liabilities each to the other.

*Written off upon transfer free and clear to U. S. Maritime Commission under agreement dated August 15, 1938, and supplement dated August 19, 1938—See "Agreement respecting Adjustment Plan of Dollar Steamship Lines, Inc., Ltd."

766 In the District Court of the United States for the District of Columbia

Civil Action No. 31468

R. STANLEY DOLLAR, ET AL., PLAINTIFFS

v.

EMORY S. LAND, ETC., ET AL., DEFENDANTS

Order, judgment, and decree as corrected pursuant to Rule 60 (a) of Federal rules of civil procedure

Filed Jan. 7, 1946

This cause having come on for hearing on plaintiff's motion for a preliminary injunction; affidavits having been filed in opposition to the motion for preliminary injunction; briefs having been submitted; and counsel for the parties having been heard on November 15 and December 20, 1945; it is hereby ordered, adjudged, and decreed that:

1. The application of plaintiffs for a preliminary injunction be, and it is hereby denied.

2. On the Court's own motion, the complaint be and is hereby dismissed with prejudice.

H. A. SCHWEINHAUT,
Justice.

Dated: December 21, 1945.
Corrected order approved:

JOHN F. SONNETT,
Atty. for Defendants.

Note of The Robert Dollar Co in favor of Dollar Steamship Lines, Ltd (Hong Kong)—Cancelled		$1,515,973.24
227,790 shares class B and 2,075 shares class A stock of Dollar Steamship Lines Inc., Ltd	$1,415,972.24	
Office equipment, furniture, furnishings and fixtures and automobiles received	100,000.00	
Cancellation of management agreement between Dollar Steamship Line (Cal.) and The Robert Dollar Co	1.00	
Note cancelled		1,515,973.24
Stocks and other consideration received	$1,515,973.24	

767 In the District Court of the United States for the District of Columbia

Civil Action No. 31468

R. STANLEY DOLLAR, ET AL., PLAINTIFFS

v.

EMORY S. LAND, ETC., ET AL., DEFENDANTS

Order granting injunction pending appeal

Filed Dec. 26, 1945

This cause having come on for further hearing on motion of plaintiffs for an injunction pending appeal; and counsel for the parties having been heard on December 21, 1945; and it appearing to the Court that the relief herein granted is necessary to preserve the status quo pending an appeal by plaintiffs to the United States Court of Appeals for the District of Columbia; it is

Ordered that until the decision of the appeal in this case by said Court of Appeals, the defendants, their officers, agents, employees and all persons acting in concert or participation with them, are hereby restrained from selling or disposing of the corporate stock issued in the name of the American President Lines, Ltd. and now in the possession of the defendants; provided, however, that plaintiffs shall first have given security in the sum of five thousand dollars ($5,000.00) in the form and manner required by law and approved by this Court; and provided, further, that plaintiffs shall first have filed with the Clerk a notice of appeal from the order, judgment, and decree of this Court entered on December 21, 1945; and provided, further, that plaintiffs shall promptly and without delay take all steps necessary to perfect said appeal and to advance the hearing of said appeal before said Court of Appeals.

H. A. SCHWEINHAUT,
Justice.

Dated: December 26, 1945.

768 In the District Court of the United States for the District of Columbia

Civil No. 31468

R. STANLEY DOLLAR, ET AL., PLAINTIFF

vs.

EMORY S. LAND, ET AL., DEFENDANT

Notice of appeal

Filed Dec. 26, 1945

Notice is hereby given this 21 day of December 1945, that the plaintiffs in this cause, R. Stanley Dollar, et al., hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 20 day of December 1945, in favor of the defendants against said plaintiffs.

CLINTON M. HESTER,
Attorney for Plaintiffs.

Memorandum

December 26, 1945

Bond ($5,000.00) on appeal of Plaintiff approved and filed.

769 In the District Court of the United States for the District of Columbia

Civil Action File No. 31468

R. STANLEY DOLLAR, ET AL., PLAINTIFFS

vs.

EMORY S. LAND, ET AL., DEFENDANTS

Statement of points upon which appellants intend to rely on appeal

Filed Jan. 7, 1946

1. The Court erred in dismissing the Plaintiffs' complaint.

Clinton M. Hester,
CLINTON M. HESTER,
432 Shoreham Building, Washington, D. C.
Attorney for Appellants.

Dated: January 7, 1946.

770 In the District Court of the United States for the District of Columbia

Civil Action No. 31468

DOLLAR ET AL.

v.

LAND ET AL.

Transcript of proceedings

Filed Jan. 12, 1946

771 WASHINGTON, D. C.,
Thursday, November 15, 1945.

HEARING ON MOTION FOR PRELIMINARY INJUNCTION

The matter came on for oral argument at 11 o'clock a. m. before Honorable HENRY A. SCHWEINHAUT, Associate Justice.

Appearances: for plaintiffs—Messrs. Clinton M. Hester, William E. Koken. For defendants—Messrs. John F. Sonnett, Assistant Attorney General; Paul Page, Solicitor, United States Maritime Commission.

772 PROCEEDINGS

The CLERK. Dollar, et al. versus Land, et al.

The COURT. Mr. Assistant Attorney General, have you filed any memorandum with me?

Mr. SONNETT. I haven't yet, your Honor, for the reason that we have not yet had sufficient time to do so. I hope to have it here within the next half hour or so. I have just served upon counsel, if the Court please, an opposing affidavit by Admiral Land, Chairman of the Maritime Commission; an opposing affidavit by A. J. Williams, Secretary of the Maritime Commission; and a further affidavit by Admiral Land dealing with the inadequacy of the amount of security posted by these plaintiffs as a condition to the temporary stay. I don't think we need get into that question just yet, however.

The COURT. When Mr. Hester presented the request for temporary restraining order, he and I both had practically no way of arriving at what the amount ought to be, and I just fixed it at the arbitrary amount of $1,000. I will hear you on that at any time you wish, if I should issue a preliminary injunction. I didn't know how else to arrive at that.

Mr. SONNETT. If the Court please, this third affidavit with respect to that question is submitted only in the event—which I think absolutely unlikely—that a temporary restraining order will issue.

The COURT. Very well. Mr. Hester.

773 Mr. HESTER. If the Court please, the Assistant Attorney General just served us with these documents. I don't want to be technical, but it may be necessary for me to express some surprise and hear what he has to say. I do believe—and, of course, my interpretation of the rule may be wrong—but I do believe, under Rule 9B of the District Rules, these should have been served on us a little sooner.

Mr. SONNETT. I have no objection to filing any affidavit counsel designates as appropriate, if the Court please.

The COURT. Let us proceed, and I will hear the matter.

Mr. HESTER. This case is before the Court for a preliminary injunction to restrain the members of the Maritime Commission from selling certain stock which the plaintiffs claim they own. In August, 1938, pursuant to an agreement entered into between the plaintiffs and the Maritime Commission, certain stock of the Dollar Steamship Line—which is now known as the American President Lines—was transferred to the Maritime Commission. The Maritime Commission claims that it is the owner of this stock; that the United States is the owner of the stock. The plaintiffs claim that the stock was given as collateral. The plaintiffs contend that the stock was given as collateral. The plaintiffs contend that the Maritime Commission not only had no authority to take title to this stock, but that the Maritime Commission was actually prohibited by law from taking title to the stock.

774 As I understand it, in this proceeding the Court is not hearing this case on the merits today; but that it is only necessary for the plaintiffs to show probable cause, and that irreparable damages will result to the plaintiffs if a preliminary injunction is not granted.

The Maritime Commission acted, that is, entered into this agreement, pursuant to which the Maritime Commission claims it took title to this stock. They based their action on an opinion of the general counsel of the Maritime Commission. The general counsel conceded in his opinion that there was no express authority to do this. He said he found implied authority in Section 207 of the Maritime Act. He said that in the body of his opinion; and then, in the conclusion of his opinion, he said he found implied authority, looking at the act as a whole.

The Comptroller General of the United States, in a report to Congress in 1940, reported to Congress that in his opinion the

Maritime Commission had no authority to take title to this stock. To use his own words, he said:

"It is of doubtful legality, to say the least."

In determining whether or not the Maritime Commission had authority to take title to this stock, we go back to a statute passed in 1820. It is the old statute which Congress follows today and which all the government agencies are required to follow, and that says that no government agency is authorized to enter into a contract unless the contract is authorized by law or by an appropriation act.

775 For a number of years the Attorneys General construed that act as requiring express authority before any contract could be entered into. About 1875 or 1880, an Attorney General modified that interpretation somewhat by saying that either express authority must be found in the statute, or it must be necessarily or naturally inferred from a duty imposed or an authority granted—necessarily or naturally inferrable from a duty imposed or an authority granted.

Just to stop for a moment on that to give an examination of an instance where you would not have express authority, but authority that is necessarily or naturally inferred, a duty imposed or authority granted, we take the case where the Maritime Commission is authorized to operate ships. It is necessarily or naturally inferred that those ships will have to be repaired, or that oil will have to be purchased for them, or equipment. Our position, as we proceed in the argument, is that that is the type of authority the Attorneys General were talking about.

To show what the courts have thought about this 1820 statute, the Supreme Court, in the case of Chase versus United States, 15 Supreme Court at page 174, had under consideration a suit to recover monies under a lease which the Postmaster General had made for a post office. The Postmaster General had been authorized to establish post offices, but the Supreme Court said

776 that the authority wasn't there. In other words, it was not necessarily or naturally inferred, from the duty imposed or the authority granted to establish post offices, to go out and lease a post office. All the Postmaster General could do would be to designate the place where the post office was going to be, and he would have to go to Congress for further authority.

And I want to say this, that this 1820 statute is the reason why Congress has spelled out in the Maritime Commission Act the authorities of the Maritime Commission—and they are very voluminous. For example, the Maritime Commission is authorized to purchase vessels, to construct vessels, to operate vessels; it is authorized, among other things, to extend or renew mortgages taken over from the old Shipping Board; to construct or repair

vessels for other government agencies, to construct cargo vessels, to enter into subsidy contracts." The 1820 statute required, unless Congress changed that old statute, that they spell these things out from the statute.

Section 207 of the Maritime Commission Act, which the general counsel of the Maritime Commission in his opinion of 1938 relied upon, conferring upon the Maritime Commission implied authority, reads as follows:

"The Commission may enter into such contracts, upon behalf of the United States. * * *"——

The COURT. Pardon me; what are you reading from?

777 Mr. HESTER. I am just quoting Section 207.

The COURT. Of what?

Mr. HESTER. Of the Merchant Marine Act—excuse me.

The COURT. Yes.

Mr. HESTER. "The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this chapter or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter."

What we have in mind is to show there was no authority, under this section of law, which the Maritime Commission said gave them implied authority, to take title to the stock. The committee report on that—and this is on the amendment; this is the latest construction by a congressional committee on this section—says:

"This amends Section 207 of the Merchant Marine Act of 1936. Section 207 of the Act provides 'that the Commission may enter into such contracts, upon behalf of the United States, as may, in its discretion, be necessary to carry on the activities authorized by this Act, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter.'

778 "The amendment adds that it 'may make such disbursements' as may in its discretion be necessary 'to protect, preserve, or improve the collateral held by the Commission to secure indebtedness' in the same manner as a private corporation.

"The amendment is designed to make clear a power which it is thought already exists in the Commission, but about which some doubt has been expressed. Under the Act, the Maritime Commission has all the general and implied powers of a business corporation. The specific reference to the power of protecting and preserving the collateral, mortgages, and so forth, held by the Commission is intended to make certain that the Commission possesses power to advance or expend funds for the preservation

of its collateral, where found necessary or advisable. Such power has often been exercised by other government lending agencies, such as the Reconstruction Finance Corporation. Without such authority, the Commission may find it impossible to protect its mortgage or other interest in vessels, the title to which is in a transitory state, or, where vessels are operated by companies which are financially embarrassed, when such vessels, because of accident or otherwise, need to be repaired or salvaged before further operation."

The position of the plaintiffs is that this stock was taken as additional collateral for an indebtedness, on notes and mortgages, which the Maritime Commission held. And, as I said be-
779 fore, if it should be held that the contract actually conveyed title to the United States, then the position of the plaintiffs is that the contract was illegal because it is prohibited by the statute.

The COURT. You are talking about what contract—a contract between the Maritime Commission and the plaintiffs?

Mr. HESTER. A contract between the Maritime Commission and the plaintiffs, pursuant to which this stock was transferred.

The COURT. Let me interrupt you, if I may, to ask this: You take the position that the Commission had no legal authority to take title to the stock. Do you urge, also, that they had no authority to take it as collateral?

Mr. HESTER. Oh, no.

The COURT. If they had the right to take it as collateral, and there is a default in the indebtedness, then they would have the right to sell it, would they not?

Mr. HESTER. That is right; but I omitted to say this, that this indebtedness—and I should perhaps give you a few more facts about this case.

The COURT. I think you should, because otherwise I may get off the track, since I don't know the facts.

Mr. HESTER. The factual situation it this: that the Dollar Steamship Company operated this round-the-world service. It was started about 1924. It was the first American service of
780 its kind which successfully competed against foreign, subsidized steamship lines. After they had been in operation some years, they got into labor difficulties, and then the Post Office held up the steamship pay; and finally Congress changed the method. They got contracts, you see, giving them pay for carrying the mail. Finally, Congress changed that method in 1937, I think June 1, so that thereafter there wasn't any mail pay, but they—the American steamship lines—were to be given what was known as an operating differential subsidy. That was a subsidy which would be the difference between the cost of

operating an American line, and repairing ships in American ports, and so forth and so on, the difference between that and the cost of operating a foreign line.

After this subsidy act was passed, on June 1, 1937, the Dollar Steamship Company operated until January 1938, without any pay whatsoever. Then in January 1938, they gave them a temporary subsidy—operating differential subsidy. The Maritime Commission gave it to the steamship company. It was not sufficient, and notwithstanding the request of the Dollar Steamship Company for a better subsidy, they did not give them any additional subsidy. That agreement was then extended; I think it went to April, and it was then extended to July. And then in August 1938, this agreement was entered into.

The situation had gotten to the point where the Dollar Steamship Company had to go into reorganization proceedings, if the government didn't grant them a further operating dif-
781 ferential subsidy and give them the operating differential subsidy they thought they were entitled to—and they had this great organization throughout the world, which had been the pride of the American merchant marine and which had operated for so many years without a subsidy. So that finally the Maritime Commission insisted upon this stock being transferred to it; and, as I say, the position of the plaintiffs is that it was transferred as collateral.

The COURT. Collateral for what?

Mr. HESTER. Additional collateral.

The COURT. For what? To secure what?

Mr. HESTER. To secure an indebtedness of $7,500,000 in mortgages and notes which the Maritime Commission held against the company.

Now, this stock was taken by the Maritime Commission, and after they took this stock——

The COURT. Under a written contract?

Mr. HESTER. That is right—under a written contract. After they took this stock, they displaced one director. You see, this stock was the controlling stock in the corporation, 93 per cent of the voting power. After they took this stock, they displaced one director. Mr. R. Stanley Dollar, president of the company, was displaced by ex-Secretary McAdoo. After that happened, the Maritime Commission loaned to this company $2,000,000 to
782 enable it to make repairs. Also, you see, they changed the name of this company to the American President Lines, and they then controlled and had possession of this stock. They changed the name of this company to the American President Lines, and loaned the company—something they wouldn't do for

the Dollar Steamship Company, these people who had been in business, in the business the old Robert Dollar, a famous character, started in 1898, when that pioneer and dean of American shipping started this company—but they loaned $2,000,000 to repair those ships to this American President Lines, now having control of it. They went to the RFC and got the RFC to lend $2,500,000 as additional operating capital.

The COURT. In addition to the $2,000,000?

Mr. HESTER. That is right. The $2,000,000 was for repairs to ships, but the $2,500,000 was additional operating capital. And then they granted this company a five-year operating differential subsidy, which resulted during the war in enabling this company to pay off all its indebtedness.

The COURT. What did they get for the $2,000,000 and the $2,500,000?

Mr. HESTER. They just got the notes of the company.

The COURT. That was no stock transaction?

Mr. HESTER. No; they do this after they get the stock.

The COURT. All right.

Mr. HESTER. They see to it this company gets $2,500,000 additional operating capital, $2,000,000 for repair of ships,
783 and additional operating expenses. Then what happens?

During the war this company, the American President Lines, is able to pay off not only the $4,500,000, but pay off the $7,500,000 that the Dollar Steamship Line owed to the Maritime Commission. And what is the result of it? The Maritime Commission today is holding this stock, worth $9,000,000, which they didn't pay anything for—and if there was ever a case of injust enrichment, this is it. Here the Maritime Commission is sitting down there now waiting to sell this stock to the public, which they never gave a penny for. They didn't take that stock to reduce the principal indebtedness of the Dollar Steamship Company one penny, and the contract expressly says so. They didn't take it to pay one penny of interest. And that is the factual situation.

The COURT. Are you now going into a new phase of the argument?

Mr. HESTER. We have here a few other sections on the authority I was going to discuss; but it would take a little time.

The COURT. Then we will recess for ten minutes.

(Upon expiration of the recess, the hearing of argument was resumed as follows:)

The COURT. Mr. Hester, it might help me a bit if I ask you a question or two before you go into the other phase of your
argument, so that I can get your position a little more
784 clearly than I have it now. This approximately $7,000,000 worth of stock secured a total indebtedness of how much?

Mr. HESTER. Here was the situation: The Dollar Steamship Company owed the Government $7,500,000, and the Government had mortgages on the steamships of the Dollar Steamship Company and had notes of the Dollar Steamship Company.

The COURT. Yes.

Mr. HESTER. This additional stock, we say, was merely additional collateral to secure this debt.

The COURT. I see. Now, as of this time, has any of the indebtedness been paid?

Mr. HESTER. Absolutely all of it, out of the profits of operations of this steamship company—and not one penny of United States money was used to pay those obligations.

The COURT. So that your position is that you are now entitled to the return of the stock?

Mr. HESTER. We are now entitled to the return of the stock.

The COURT. All right.

Mr. HESTER. As I say, the general counsel of the Maritime Commission in his opinion to the Maritime Commission in 1938, pursuant to which the Maritime Commission entered into this agreement, under which it took possession of this stock, contended that the Maritime Commission had implied authority under this
785 Section 207 which authorized the Maritime Commission to contract to carry on the activities authorized in the Act, and one of those activities was to protect, preserve, or improve collateral.

If this stock was taken as collateral, then it did improve the collateral already held. However, if it were taken, if title was taken to it, then it didn't improve the collateral in the slightest. As a matter of fact, the Maritime Commission assumed the then current liabilities of the corporation organized under the laws of the State of Delaware.

The Comptroller General construed this Section 207, in a case in which the general counsel of the Maritime Commission advised the Maritime Commission assumed the then current liabilities of the corporation organized under the laws of the State of Delaware.

The Comptroller General construed this Section 207, in a case in which the general counsel of the Maritime Commission advised the Maritime Commission that the Maritime Commission was authorized to purchase vessels, constructed in the United States, to be used as substitutes for vessels which needed replacement in our foreign merchant marine, that is, our merchant marine operating in foreign service. Otherwise, the coastwise service was excluded from it. The Navy Department wanted three vessels, and, because of their appropriation acts or statutes, they couldn't get these three vessels, I think oil tankers. So they went to the

Maritime Commission, and the general counsel of the Maritime Commission advised the Maritime Commission that the Maritime Commission, under Section 207—this general authority to contract to carry on the activities of the Commission—could purchase these vessels for the Navy. The Comptroller General said it could not be done; that there was no authority in that Section 207 for that purpose. Yet that is the section the general counsel of the Maritime Commission relied upon; and here is what the Comptroller General said, that Congress found it necessary, in Section 215 of the Merchant Marine Act, specifically to authorize the Maritime Commission to purchase vessels under certain conditions, that is, just for replacements in this foreign service, and that there was no authority whatsoever in Section 207.

786

The position we take here briefly this morning is that if there is no authority under Section 207 to purchase vessels, there is no authority to purchase the steamship line or to purchase the corporation which owns the vessels.

We also take this position, that Congress, having enumerated expressly in Section 215 that the Maritime Commission could purchase vessels for certain purposes only, under the *expressio unius* rule, it excluded purchase of vessels for any other purpose; and that what this amounted to, the taking of this stock, was not only the purchase of vessels but actually the purchase of an entire corporation, because they had the voting power. The voting power they took was 93 percent, and the total stock they took was something over 70 percent.

We now come to Section 905 and we say that in addition to Section 215, which prohibited this and made this contract illegal, that Section 905, in addition, made it illegal, and it made it illegal in this way.

787

The COURT. Wait a minute. What contract?

Mr. HESTER. The contract pursuant to which the stock was transferred to the Maritime Commission.

The COURT. You mean it made it illegal?

Mr. HESTER. To enter into that contract, if they took the stock.

The COURT. But not if it were collateral?

Mr. HESTER. Oh, no; if it were collateral, it was all right.

The COURT. So fundamentally, on the merits, this question will turn on the construction of that contract, will it not?

Mr. HESTER. Well, if your Honor should find that this contract conveyed title to the stock, then the question would arise as to whether the Maritime Commission was prohibited by law from entering into that contract—and that is our position; that it was prohibited by law from entering into that contract; that it was prohibited by the Section 215 which I have just discussed; and

now I am coming to Section 905, which I say absolutely prohibited it from entering into the contract.

Section 905 of the Merchant Marine Act, so far as it is material here, provides that—

"No corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States."

788 What did the Maritime Commission do, and what did this American President Line, formerly the Dollar Steamship Company, what did that corporation do in the light of this? That corporation transferred to the Maritime Commission, according to the contention of the Maritime Commission, title to that stock. What happened? Our position is that the Maritime Commission is not a citizen of the United States within the meaning of the statute. Therefore, this corporation, under this Section 905, in order to qualify for the benefits under the Act, that is, for operating differential subsidies and other benefits under the Act, could not transfer the majority of its stock to anyone other than a citizen of the United States, and yet, it did just that—it transferred it to the Maritime Commission.

We say if they transferred title, then that corporation immediately was disqualified to receive any benefits under this statute, because the United States is not a citizen within the meaning of this statute. The rule is that the United States is not included in a statute unless expressly named therein, except where it has a legal right and to deny it that right would be to deny its citizens a benefit, as in one case where the Maritime Commission foreclosed a mortgage and the priority creditors intervened and said they should come ahead of the United States because the United States is not named; and the court held there that the Maritime Commission had legal authority to enter into that mort-

789 gage, and therefore to deny it the right would not be proper, because they had the legal authority to enter into it.

The position we take here is there was no legal authority whatsoever to enter into this contract; and, therefore, that exception to the general rule of law is not applicable in this case.

In a recent case in the Supreme Court of the United States, the Supreme Court has given some idea as to how far it will go in not treating the United States as coming within the statute. That case involved a civil suit for treble damages under the antitrust laws, and the government took the position the United States was a person within the meaning of the statute. The Supreme Court there said:

"No, you cannot strain words to bring the United States within the intent of a statute."

In this case, if it should be held that the United States is a citizen within the meaning of this statute, then a constitutional question is raised, which we are not pressing at the moment; but I would like to cover that briefly, and it is this:

If the United States was a citizen within the meaning of this statute, what has Congress authorized the Maritime Commission to do? It has authorized the Maritime Commission to delegate its sovereign powers to a state corporation, which is exactly what it has done in this case, because this is a
790 Delaware corporation; its officers and directors are subject to the control and the regulation of the state laws of Delaware. And what does that mean? It means subject to taxes. It means they lose their immunity to suit, which is enjoyed by the United States, and other benefits; and they are subjected to all of these liabilities.

In an opinion rendered by the Attorney General, reported in 33 Opinions of the Attorney General, 570, he was considering whether or not the Shipping Board could transfer vessels to a state corporation and take, in return, stock; and he held that the shipping laws did not authorize that to be done; that it must be very clear, from the act itself, that that authority was there. He didn't consider the constitutional question; but that is pertinent to this discussion here.

Our position is that if the United States should be regarded as a citizen within this statute, and therefore they had the right to go out and take the controlling stock, to buy the controlling stock, and to take title to the controlling stock in a state corporation, they are delegating sovereign functions to the officers and directors of that corporation, and they are not subject to prosecution in the courts of the United States for misfeasance and malfeasance under the old case of United States versus Strang, which went to the Supreme Court, and they are also subjected to all these liabilities.

We have numerous other objections, but we don't care to
791 raise them at this time. I would just like to discuss for one moment the irreparable damages which will result to the plaintiffs in this case if a preliminary injunction is not issued.

The COURT. And you might also give me, at the same time, your views on what the Maritime Commission will suffer if I grant it.

Mr. HESTER. There are any number of bidders all over the country for this stock. They are grouped and the groups are spread out all over the country. I would be glad to have my friends here correct me on that if I am wrong. If this stock is sold, we would have to file suits against these purchasers all over the country. There would be a multiplicity of suits in a multiplicity of jurisdictions and in the various courts, and it might be years, if ever, before we ever got our remedy.

The COURT. What remedy would you have?

Mr. HESTER. To be frank with you, I don't know; I just don't know. It would be such a colossal task to bring these suits all over the country, that for the moment it is a little beyond me. We would have to file suits all over the United States.

On the other hand, the situation is this: Why is the Maritime Commission complaining about the delay? In the first instance, let me say again, here they have something they never paid a
792 penny for. And what has happened? All the indebtedness has been paid. And what have they? Stock worth $9,000,000 we contend is owned by the plaintiffs in this case.

What happened? This agreement was entered into in 1938. These debts were paid back by this corporation—not by the Maritime Commission or by the United States, not one penny of the money of the United States. These debts were all paid back.

The COURT. By whom?

Mr. HESTER. By the company itself.

The COURT. Which company?

Mr. HESTER. The same management. The Dollar Steamship Line, when the stock was transferred, the Maritime Commission changed the name of it to the American President Lines. But that same company, out of its operating profits, paid every penny of it back.

What is the damage to the Maritime Commission? I may be wrong about my facts, and if so I would be glad to have my friends correct me on it. They have advertised this stock for sale. We did not have any right to have this returned until the debts were paid, and according to our information the debts were paid in 1943 and 1944; but we were then in the midst of a great war, and it would have been very unpatriotic for us to have instituted any suit at that time; so we didn't institute a suit until we were forced to do it. We were forced to do it while the
793 Japanese war was still on, because they advertised the stock for sale about June or July 1 of this year. We made demand for its return and they refused to return it. We tried to work it out with them administratively and we couldn't do it. So we are compelled to come here and throw ourselves upon the mercy of the Court. We would have been here before, had it not been for the fact that the war was on.

I don't see what possible damage can accrue to the Maritime Commission. It merely means, if your Honor would find against the defendants in this business, they would have to readvertise for bids. The reason I say this is that the war is over now, and we are going to start expanding our merchant marine. The administration has committed itself to a policy of expanding our merchant marine. We are going to put our flag on the seven seas again.

In 1908 when President Roosevelt sent the fleet around the world, they saw only one other American flag in Japan. The Dollar Line put the American merchant flag upon our ships. They did it, of course, with the help of our government; but they did it first without the help of our government.

What is happening? This stock is appreciating in value all the time. What can they possibly lose? With that, I rest on the case and ask for a preliminary injunction. If your Honor takes this matter under advisement, we ask that the restraining order
794 be continued until your Honor can decide the question. Thank you.

Mr. SONNETT. If the Court please, I would like to file the affidavits which I previously served on counsel for the plaintiffs. And I should like further to request leave of the Court to file the government's brief this afternoon. It is now being typed and will be here sometime this afternoon.

The COURT. Very well.

Mr. SONNETT. If you Honor please, this is a shocking attempt made in this complaint to upset an agreement made in August of 1938—seven years ago—a formal, written agreement, made after extensive negotiation between these plaintiffs and the government, during which plaintiffs were represented ably by able counsel and were fully legally advised, which agreement provided for the passage of legal title to these certificates of stock, in exchange for very valuable consideration moving to these plaintiffs.

The COURT. What was it?

Mr. SONNETT. That consideration was the release of indebtedness owed by these plaintiffs to the Government of the United States by way of guarantee of money owed by the Dollar corporation, in substantial amount.

The agreement purported by its terms to convey title to the stock. It did so. Now, seven years later, the stock, then having been worth substantially nothing, the common stock here in-
795 volved, seven years later it being worth eight or nine million dollars, these plaintiffs decide that they, and not the American public, should get the nine million dollars. That is basically the question the Court is confronted with.

We have, first, a few observations as to the facts that I should like to present, because I am not entirely clear that the Court has them in mind. First, in the latter part of 1937, the Dollar, which I will call Dollar of Delaware, the corporation the stock of which is here involved, was indebted to the United States in a sum in excess of seven and a half million dollars. That sum represented ship construction, ship sale, and reconditioning loans made to that company by the United States. Those loans were evidenced by promissory notes secured by ship mortgages, and construction or

reconditioning mortgages. Plaintiffs were jointly indebted with Dollar of Delaware in those obligations. In addition to holding preferred stock in Dollar of Delaware, the plaintiffs held substantial blocks of common stock, in classes A and B.

The COURT. This is common?

Mr. SONNETT. That is common, and it is the stock here involved. Dollar of Delaware at that time, that is, in late 1937, was in very serious financial difficulties. By statute, by congressional enactment, the mail contracts were to be terminated. Dollar's financial condition was extremely serious. Under the Merchant Marine
Act, the Maritime Commission was required to consider
796 various factors which would enter into its determination whether or not to grant to a particular company an operating subsidy, in order that it might compete with foreign shipowners.

The Dollar of Delaware Company, in the latter part of 1937, applied to the Maritime Commission for an operating subsidy. That application was, of course, pursuant to the Act, and that Act gave discretion to the Maritime Commission to grant or to withhold operating subsidies, dependent upon various conditions which it might examine into. The Commission was obliged to consider, among other things, the financial resources and the stability of the company, the character and efficiency of its management, as affecting its ability to maintain adequate service in the future, if granted the operating subsidy.

In that connection, the judgment of the Commission, which was a fact set forth before your Honor in the affidavit of Admiral Land, was that the financial position of the company and its management were not such as to justify approval of the application for an operating differential subsidy.

Thereafter, in an effort to solve the problem of Dollar of Delaware and secure the continuance of its service, which the Maritime Commission rightly regarded as essential, negotiations were had looking toward a program for rehabilitating the company so as to
get its finances and management in shape to operate effec-
797 tively these ships in the interests of the United States.

The early negotiations, again as set forth in the affidavit of Admiral Land, contemplated that there be additional guarantees given by these stockholders, these plaintiffs, to secure any additional advances. That plan was declined by these plaintiffs.

Thereafter an agreement was entered into, which is set forth as an exhibit, I think, both to the company and to Admiral Land's affidavits, and also contained in one of these blue books marked Exhibit A. Under that agreement the stockholders undertook,

in exchange for a release to them by the United States of their obligations, as joint obligors on this indebtedness to the United States, to give up this common stock and transfer it absolutely to the United States.

There is not a single word in the agreement which refers to a pledge of that stock so transferred to the United States. Indeed, the prime negotiations make it very clear that no such intention was in the minds of the parties, because they considered previously some proposal along those lines, which had not been accepted. Such proposal had been discussed but not accepted.

The resulting written agreement, contained in that exhibit, provided that the plaintiffs would transfer, and they did transfer, their Class A and B stock, in blank, and with transfer tax stamps affixed. They delivered that stock to an escrow agent, for
798 delivery to the Commission upon completion of the other factors of the agreement. Thereafter, the loans referred to were made. The operating differential subsidy applications were approved. The contracts which the releasing of the plaintiffs' obligations contemplated by this agreement were thereafter executed and delivered, and the stock certificates were delivered by the escrow agent to the Commission, with transfer tax stamps affixed, and have been held by the Maritime Commission ever since. That was in October 1938.

About July 6, of 1943, the Commission determined to dispose of this stock, and publicly offered the stock for sale, just as it did here recently again.

The COURT. When did they do that?

Mr. SONNETT. July 6, 1943. At that time no bid was received which the Commission regarded as satisfactory. But, although public notice was given, as it was by the advertisement, not a word was heard from these plaintiffs asserting any title or claim to the stock, although they knew the United States proposed to sell the stock in 1943.

Prior to the execution of this agreement of August, 1938, a press release was issued by the Commission in which the Commission stated to the public it proposed to sell or might sell or dispose of this stock. This was prior to the transaction. Not a word was ever heard in protest to that press release, and no criticism was ever made of that press release.

In 1940, another attorney representing these plaintiffs—
799 and this was before the war—advanced substantially similar claims to the Commission, as these claimants now make. The claims were rejected by the Commission, and no suit was filed and no legal action was taken. That was five years ago.

We think, under the circumstances, if the Court please, there is a very noticeable lack of any equity whatsoever in these plain-

tiffs. We think the written agreement is clear on its face. We think the meaning of that written agreement, if it were in any doubt—which it cannot be, from the terms of the agreement—is apparent upon consideration of extrinsic circumstances some of which I will advert to later. But, in substance, that is our position on the facts and the equity involved.

The COURT. May I interrupt you to ask—and you may not know this, but Mr. Page will—does the Commission periodically report to Congress a list of its assets and liabilities?

Mr. SONNETT. I cannot answer that question.

Mr. PAGE. It makes a report, your Honor. If it then specifically lists all assets and liabilities, including this stock, I cannot say; but I can supply that information this afternoon.

The COURT. It may not be important, but what I want to ask is this, whether or not in such reports you have consistently listed this as an owned asset, or whether it is listed as collateral. In either case, of course, under appropriate circumstances, you would have a right to sell; but you would sell, as an owner of collateral or holder of collateral, in a very different status than as owner of the stock itself.

Mr. SONNETT. I think I may answer the Court's question in this fashion: The Exhibits A-1 and A-2, annexed to Admiral Land's affidavit, consist of a compilation of documents sent to Congress. Those documents, as far as they have to do with the August 1938 agreement, clearly indicate the Commission was considered in possession of the stock. There isn't a word that can be pointed to where these plaintiffs ever sought to characterize this as a collateral transaction—not a word. What has happened, in fact, I believe, is that these plaintiffs have now decided they have evolved a legal theory of impossibility, by which they can now, with the aid of a court of equity, set aside solemn agreements made by them seven years ago and never repudiated by them.

Now, as to the reasons why we think this application for a temporary injunction should be denied, and why we think the complaint should be dismissed—first, this is clearly a suit against the United States. The plaintiffs in this case seek to interfere by this action with the record title—and there is no dispute about this fact, that the title is in the name of the Maritime Commission, as a matter of record title, with the transfer tax stamps affixed when they were transferred, when the certificates of stock were transferred to the Maritime Commission, and with the possession by the United States of that stock.

The law, I respectfully submit, is well settled that a suit to divest the United States of property, which it possesses and to which it asserts title, is clearly a suit against the United States. The United

States has not consented to be sued in such a suit. Accordingly, for that reason alone, the complaint should be dismissed.

The COURT. The Maritime Commission is not sueable?

Mr. SONNETT. Not on this type of case, if the Court please. This is a case where the Maritime Commission asserts a proprietary interest to shares of stock held by it and which it has possession of. There is no statutory authorization for a suit of that type against the Maritime Commission.

In that connection I might, with the Court's permission, refer briefly to the language used in the Lincoln Electric case, in 56 Federal Supplement, where the court said, as to this problem:

"If, for example, the object (of the suit) is to compel specific performance of the contract between the United States and the plaintiff, or to compel an officer to pay money out of the Treasury, or otherwise to hand over property which the United States claims to own, or to prevent the United States from using property
802 which it owns or claims to own, in all these cases, where the United States is the real party in interest, a suit must fail."

There are and will be other authorities on that point submitted to your Honor in the government's brief. However, I think that the application of that general principle to the facts of this case is clear. Only by divesting the United States of title to property, which it claims, and of the possession of that property, can the plaintiffs succeed in this suit. The impact of the decree is one which necessarily affects the United States.

The second reason which we respectfully advance is that the certificates of stock involved in this case were in fact absolutely transferred and that the Maritime Commission had legal authority to acquire them. I might say that there are really two points the government advances.

First, as to the fact, I don't think counsel will dispute with me the fact that everything these parties could have done, that is, these plaintiffs, the corporation, and the government, back in 1938, to transfer title to these stock certificates, was done. There wasn't anything they overlooked—transfer and delivery and possession—an uninterrupted possession by the government for several years. There are no other way that could have been devised to transfer title except the way they followed.

It isn't mentioned in the agreement or in the documents
803 anywhere that the stock was collateral. That, I submit, was an afterthought—an afterthought which occurred to the plaintiffs when the stock had appreciated in value.

The COURT. I suppose you would agree, assuming the suit could be brought at all, that a court can look beyond the form of a docu-

ment—for instance, that a court can take a deed in fee and construe it to be in fact a mortgage.

Mr. SONNETT. I would not dissent from your Honor's statement of the powers of a court of equity in that respect. However, not only is the intention of the parties clear from this written agreement, but every single contemporaneous circumstance supports that contention.

I might say, in passing, there is a very interesting little contrast in this agreement, which I think is helpful. Certain shares of the stock in question had been pledged previously by these plaintiffs with a bank, to secure a loan. In this agreement, very careful provisions were made spelling out what would be done with the stock pledged to this other bank and how the government could get title to that stock. Those provisions, which will be set forth in detail in our brief, in substance provided that upon payment of the indebtedness for which the stock was pledged, the stock could be delivered free and clear to the Maritime Commission, or that upon payment of two dollars per share, or some such figure, the Maritime Commission could acquire title to the stock,
804 free and clear of all liens and incumbrances.

It is inconceivable to me that these plaintiffs, represented as they were by able counsel, and the government, being also represented as it was by able counsel, could have drafted an agreement, using language of title and title only, and not using a word which signifies intention to transfer this stock, all of it, as collateral, if the latter were intended. It is inconceivable to me that that could have happened.

The suit is an afterthought, now that they realize the stock, once worthless, is worth nine million dollars. That is why the suit is brought.

The fact that it was the intention of the parties to transfer title absolutely is clear from the language of the Adjustment Plan Agreement itself. Various provisions of this agreement to which I would like to refer briefly are:

"Dollar of California will transfer, or cause to be transferred, all of said stock to the Commission, or its nominee, free and clear of all liens and incumbrances."

That is in paragraph 1 of the agreement. Paragraph 2 provides that the plaintiffs and certain other parties not here involved will respectively transfer, or cause to be transferred, to the Commission, or its nominee, free and clear of all liens and incumbrances, the respective number of shares" listed in the paragraph.

Paragraph 4 of the contract provides that the plaintiffs
805 shall transfer to the Commission, or its nominee, all rights and interests of the plaintiffs and certain other parties,

whose pledging of the shares of stock I referred to previously, pledged to another bank on a previous loan.

Paragraph 5 (b) referring again to the stock previously pledged to the bank, says:

"For a period of five years from date, the Commission, or its nominee, shall have the right, at any time, to purchase and take over all rights and interests of the pledgee (including the rights and interests of the pledgee in and to all collateral then pledged) upon payment of a sum equal to the balance due on account of the loan for which the A stock is so pledged, and in such event to release said A stock from the pledge, and transfer said A stock to the Commission, or its nominee, free and clear."

Paragraph 23 (d) of the contract provides:

"That the Commission shall have no duty or obligation to make any payments, loans, or advances whatever to Dollar of Delaware or to any creditor of said company or otherwise except only in such amounts and under such terms and conditions as may be expressly provided in said subsidy and loan agreements, nor shall it have any duty or obligation whatever to continue, or to provide for the continuation of, the operations, or any part of the operations, of Dollar of Delaware except as may in said agree-
806 ments be expressly provided, nor shall it have any duty or obligation to continue to hold any of the stock, or any interest in or to any of the stock, of Dollar of Delaware which it may acquire under the terms and provisions hereof or otherwise."

If that doesn't mean title, I respectfully submit it doesn't mean anything, and the language is meaningless, because it gives the Commission the right to sell at any time the stock it so acquires. Obviously, the Commission could not transfer title to the stock at any time, if it were merely pledged as collateral and to be returned to the plaintiffs upon payment of this debt. That paragraph alone, I submit, entirely negatives any claim that there was a collateral transaction involved.

In addition to the clear language of the agreement itself, the attorney at that time for these plaintiffs, Keith R. Ferguson, delivered a written opinion to the Commission, in accordance with the usual closing routine, and in that written opinion he said that the delivery of the certificates of stock to the Maritime Commission—

"* * * will constitute valid and legally enforceable instruments of transfer, and will convey to the Commission and to Dollar of Delaware, respectively, valid title to the shares of stock and the physical property covered by such instruments of transfer, free and clear of any liens or encumbrances whatsoever."

807 The Assignment and Option Agreement, which was an implementing agreement to the August 1938 agreement, ea-

tered into between R. Stanley Dollar and the Anglo California National Bank of San Francisco, on October 26, 1938, provided, in part, with respect to some of the stock here involved, that R. Stanley Dollar—and I quote:

"* * * hereby sell, assign, transfer, and set over unto the Commission, subject to said existing pledge (of the stock to the bank), all their right, title, and interest in and to said class A stock."

There are other provisions, but I think that is clear enough.

The Assignment and Option Agreement, again an implementing agreement to this one of August 1938, entered into between the Estate of J. Harold Dollar and the Anglo California National Bank of San Francisco, contains similar provisions.

After execution of the August 15, 1938, contract, the same lawyer, Keither R. Ferguson, representing the plaintiffs, acting as one of the executors of the Estate of J. Harold Dollar, which estate had had title to a substantial portion of this stock, applied to the Court, the Superior Court of the State of California, setting forth the intention of plaintiffs to convey title to the stock to the Commission and describing the transaction so that he might have the probate court's approval of the transaction. The Superior
808 Court made and issued an order finding that the transfer of the title to the stock, held in the name of the tate, would have the advantages represented, and authorized the transfer to be made. That is a matter of official court record in the Superior Court of California. After the transfer was made, the stock was entirely eliminated as an asset of the estate, and there is nothing in that proceeding in any way to suggest there was a collateral transaction. It is perfectly obvious it was a title transaction.

Counsel referred previously to the fact that the name of Dollar Steamship was to be relinquished to the Maritime Commission. Why, if it was a collateral transaction? It was being transferred because the Maritime Commission was acquiring the stock of this company and wanted the name Dollar to go along with it. That is a provision of this agreement.

I think, if the Court please, it is overwhelmingly clear, by every bit of affirmative evidence that exists, that the parties intended to and attempted to transfer title. I say the parties did transfer title, and that the Commission had legal authority to acquire that title.

Now, as to legal authority of the Commission——

The COURT. Are you now come to the question of whether the Commission had legal authority to acquire title?

Mr. SONNETT. I am, sir.

The COURT. Then, if you don't mind, we will recess until
809 one thirty.

(Whereupon, the Court was in recess at 12:20 until 1:30.)

AFTER RECESS

The COURT. Mr. Sonnett.

Mr. SONNETT. If the Court please, to summarize for a moment, we have presented the government's contention that the agreements entered into between the parties in August 1938, and all of the documents, show clearly an unmistakeable intention on the part of both sides to transfer absolute title and ownership of this stock. We have also adverted to what is an undisputed fact, that the stock, in accordance with that agreement, was formally transferred.

Coming now to the question of the Commission's legal authority to acquire title to the stock—which, I take it, is the only real point counsel has advanced—as I understand his argument, it reduces itself to this: No matter what the parties intended to do or tried to do, they could not have transferred title to the Commission, although they attempted to, because the Commission did not have power to acquire title.

On this question of the Commission's legal authority to acquire title and ownership to the stock certificates, I respectfully submit that it is clear, for two reasons, that the Commission had such power. At the time, that is, in August of 1938, the govern-
810 ment was advancing additional sums to this company, Dollar of Delaware—very substantial sums. Those sums, and all prior advances, were secured by formally executed mortgages on the ships and properties of the company. Those advances were, therefore, covered by collateral. The RFC advance of several million was a first mortgagee lien. The Maritime Commission advance was a second mortgage lien. Counsel would now have us believe that the parties proposed to supplement that formal mortgage agreement, wherein the mortgage liens on the property were created as security for all the advances made by the government, by transferring title to the stock, as some sort of additional collateral.

First, of course, at that time the stock was of substantially no value, because of the financial difficulties this company was then in. The stock since that time, in answer to the Court's question this morning, has been carried uniformly by the Maritime Commission as its stock. It has been carried on its records that way and it has been so reported to Congress. The annual report to Congress as of June 30, 1944, by the Maritime Commission carried this stock as an asset of the Maritime Commission, at the value of

the stock, its stated value, which has the B stock $1 a share and the A stock $5 a share, showing the total value of these assets held by the Maritime Commission at $2,666,000.

Prior to the annual report submitted to Congress on June 30, 1944, the Maritime Commission statements carried this
811 stock as assets of the Martime Commission, but at a nominal $1 value. So that throughout, as far as Congress or reports to Congress may be concerned, the Martime Commission has uniformly and consistently asserted ownership to this stock.

Consideration of the legality of the acquisition of title requires, it seems to me, some slight consideration of the purposes to be served by the acquisition of title to the stock, so far as the Maritime Commission is concerned. Those purposes were twofold.

One, that the stock was *accepted in payment* of obligations, as part of the consideration for the release of obligations owed by these plaintiffs to the United States. The power so to acquire property in discharge of obligations owed the United States is an inherent power, and I will come to that a little more fully later on.

With respect to the statutory power, as well, set forth in the Act, which I would like to discuss, I submit there was clear statutory authority. The amendment counsel discussed has nothing to do with the subject we are dealing with. If it did, it would be only favorable to our position and adverse to the plaintiffs' contentions. But the statement made by counsel concerning a change or changes in management, or the fact that there was a continuance of the same management, may be misleading to the Court. One of the purposes served, and indeed a paramount purpose served
812 by the acquisition of title to the stock by the Martime Commission, was so that the previous management could be eliminated, because it was the view of the Martime Commission that the previous management had not been adequate to run this company effectively. That was one of the things the Commission was called upon to determine.

Prior to the specific transaction of August, 1938, there had been changes on the board of directors as a result of the negotiations between the Martime Commission and the company. After this agreement, the only remaining director—if I may use the term—of the old management, was R. Stanley Dollar, who resigned. There was a real purpose, in other words, in eliminating the prior management, in the view of the Maritime Commission; and to insure the elimination of management not regarded as satisfactory by the Maritime Commission, the common stock which had the voting rights and control of the company, was acquired. That purpose was wholly foreign to any purpose of acquiring the stock as collateral.

It so happens that since that time the stock has appreciated in value greatly. That, however, does not affect the purpose for which it was acquired—and the benefit of it clearly should go to the owner of the stock and not to these plaintiffs.

The stock acquisition, then, wasn't an ordinary case of the Maritime Commission going out just to buy a block of stock in a company. Indeed, if the Maritime Commission
813 does that, I find no specific prohibition in any statute for the Commission's so acting. But apart from that, it is the fact that the acquisition of this stock, as far as the ownership of this stock is concerned, was incident to an over-all, comprehensive plan for the rehabilitation of this company, by which there was a substantial consideration moving to these plaintiffs, by way of releases, primarily, of obligations they owed to the United States.

The law, I respectfully submit, is clear that in the absence of any express, particularized provision, the Maritime Commission nevertheless had general power so to act.

In the old case of Neilson against Lagow (12 Howard 98), a statute provided that no land shall be purchased on account of the United States, except under a law authorizing such purchase. In spite of that prohibition, it was held the government could take title to and it did in fact acquire property which had previously been taken as security for a debt. To deny this power, the power to acquire title in discharge of indebtedness, the court said, "would deprive the government of a means of obtaining payment, often useful and sometimes indispensably necessary."

In an opinion of the Attorney General, in 37 Opinions of the Attorney General, the Attorney General referred specifically to the question of acquiring security, that is, stock and the like, and said:

814 "In numerous decisions of the Supreme Court the principle has been laid down that in the exercise of sovereignty the United States is permitted and authorized to complete its business transactions in the same manner and to the same effect as private citizens; and, where it is advantageous, it may accept securities (that is, stock certificates) for debts, even in the absence of authorizing statutes. Such settlements have been upheld. The federal courts have held that lands as well as monies may be accepted in claims due the United States"—and so on.

I submit, therefore, that wholly apart from specific, statutory authority, the Maritime Commission, as an agency of the United States Government, does have an inherent power to accept property such as shares of stock in settlement of debts owed the United States. These plaintiffs owed debts to the United States, and the agreement clearly indicates the stock was accepted by the United

States in discharge, as part consideration, for the release of the obligations owed by these plaintiffs.

Coming now to the statutory language which counsel has adverted to earlier, namely, Section 207 of the Act, that provides:

"The Commission may enter into such contracts upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities
815 authorized by this chapter or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter."

Counsel has adverted at some length to the last portion of that statutory provision. For the moment I should like to concern myself with the first portion, that—

"The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this chapter * * *."

The agreement of August, 1938, was such a contract, squarely within the statutory authority of the Commission. The agreement was made in connection with the granting by the Commission of financial assistance to the steamship company the services of which were regarded by the Commission as necessary to the national welfare. The acquisition of stock was only an incidental part of that contract. The activity itself I am certain counsel cannot challenge in any way, namely, the subject-matter with which the Commission and these parties were dealing.

The contract, therefore, containing as it does one provision relating to the acquisition of stock, is a very different contract from one which would be solely where the Commission, without
816 relation to any of its stated purposes, went out and acquired stock ownership in a steamship company simply as an investment or for any other purpose. This was part of a reorganization plan necessary to carry out the duties imposed upon the Commission.

The latter portion of that section, I submit, has nothing to do with the issue before the Court. But if it did—if it did—the language would only be helpful to the government's contentions, because the Commission is authorized, in addition to its broad power to make contracts which in its discretion are necessary to carry out its activities, in addition to that the Commission is authorized, by the amendment which the latter half of this section of the statute represents, "to protect, preserve, to improve the collateral held by the Commission to secure indebtedness."

It serves no purpose to assume, as counsel would have this Court do, that this stock was collateral in connection with an indebtedness. That is assuming the very question which is before the Court. It is not collateral and was not so intended. The evidence I think is overwhelming on that point.

However, I cannot see the logic of a connection that the Commission may take stock as collateral, unless also the Commission may acquire title to stock—because what would the Commission do with the stock in case of default? It would certainly have to convey it to someone. Certainly the taking of stock as col-
817 lateral, without power to convey title to someone else, would be a futile thing. The answer, I submit, to that contention on the part of counsel is, first, that the inherent power of the Commission as an agent of the United States to accept property in the settlement of debts is broad enough to warrant the action taken in respect to this stock in any event. Secondly, under the specific authority with respect to contracts, this was such a contract and was so authorized.

Turning to the further question of the standing of these plaintiffs to now, seven years later, contest in this action the validity of the transaction in question, if we were to assume, as the plaintiffs contend, that the transaction was unauthorized, in fact, these plaintiffs cannot, in any event, now attack it. They were subject to the election, to the requirement to elect, promptly, in the event the transaction was unauthorized. It was entered into seven years ago. It was not until 1940 that the question was ever raised. The counsel at that time for the plaintiffs raised the question with the Commission. He was informed the Commission of course asserted title to the stock and owned it. Nothing was done, and no action was ever taken.

In 1943 a press release was issued concerning the fact that the Commission was going to sell the stock—and no action was ever taken by these plaintiffs. It was only until recently, when
818 the decision was made to sell the stock at this time, that action was finally taken. That period of time has elapsed, if the Court please, seven years, during which these plaintiffs have accepted the benefits of this agreement.

The COURT. In what respects?

Mr. SONNETT. They accepted the release of their obligations to the United States. They were also, if the Court please, holders of preferred stock, and still hold that preferred stock. That was a benefit of this agreement which they have retained.

I would refer the Court to, among others, a recent decision in Gray against Commodity Credit Corporation, where plaintiffs asserted they had been compelled to sell to the Commodity Credit

Corporation by means of regulations of the War Foods Administration; that the prices wre inequitable; and that, after carrying out the transactions, they had, in fact, to rescind them for those reasons. The court there held that, having entered into the contract, having performed it and accepted its benefits, the plaintiffs were precluded from challenging its validity or the legality of the governmental action which underlay it.

The record may not show whether these plaintiffs received dividends on their preferred stock. I am informed that is the fact; but I don't argue it if the record before the Court does not show it. In any event, they retained and received any benefits
819 accruing to the preferred stock; they received the benefits *of being released from obligations they owed* the United States; and they have enjoyed those benefits up to the present time.

The COURT. Have you filed a motion to dismiss this petition?

Mr. SONNETT. I have not, if the Court please, for the reason, first, that there was inadequate time; second, that I believe that a motion for a temporary injunction searches the record, and if the complaint is unsufficient, it should be dismissed by the Court on its own motion. I would suggest to the Court that the Court do so, should the Court agree with the contentions of the government.

The very contention which plaintiffs' counsel advanced this morning, to the effect that this was a collateral transaction, that the debts are all paid, that the government didn't put out any money in this situation, and that the government is now going to realize eight or nine million dollars, has been advanced unsuccessfully before in cases where only that issue was involved. For example, in the Alexander case, in 142 Federal 2d, before the Circuit Court of Appeals, there was a transfer of stock in a corporation, which stock at the time of the transfer had little if any value. The plaintiffs sought later to convert that transfer into a pledged transaction and contended that the property in fact never became the property of the defendant, because while
820 in the defendant's possession the dividends from the stock were adequate to pay off the indebtedness which had been involved in that case, and that consequently the plaintiffs were entitled to recover the stock certificates.

The court held, first, that the stock transfer was an absolute one and not a pledge arrangement; but that, in any event, plaintiffs' acquiescence in defendant's possession for approximately nine years, and defendant's expenditures and assumptions of risk incidental to its possession estopped the plaintiffs from advancing their claims to recover the stock.

That, I think, wholly answers the contention made by counsel this morning. Further, as to the plaintiffs' standing now to

challenge this transaction made seven years ago, I would refer briefly to the well-settled rule that if the transaction were illegal, plaintiffs participated in it and a court of equity will lend them no aid.

There is one final point, if the Court please, which I should like now to suggest, and that is a possible question of the statute of limitations. I say "possible" because I am not entirely clear just how the plaintiffs' complaint can be classed; but, as I read it, it is a cause of action which they purport to state to the right for a return of the stock by way of rescission, or some sort of rescission, and for a mandatory direction to a government agency to turn back property transferred in 1938. Whatever view
821 you take of it, it seems to me their cause of action, if any, accrued in 1938 when the contract was executed, the stock transferred, and their obligations to the government released. Since more than seven years have elapsed, I think the three-year statute of limitations might be applicable——

The COURT. How could the three-year statute of limitations be applicable in a situation such as this? The equitable doctrine of laches would apply, would it not?

Mr. SONNETT. It is there my difficulty comes, if the Court please—whether this is an inartistically stated cause of action for rescission and mandatory return, or whether it is the general, equitable cause of action, I am not entirely clear. But, whether it be the three-year statute of limitations or whether it be laches, I think the answer is the same, in light of the facts in this case, that the cause of action, if any, accrued either at a time long enough ago to come under laches, or prior to three years, where the statute of limitations would apply.

One final word and I will be done, if the Court please. The obligation on these plaintiffs is to make a clear showing of a right to equitable relief. The cases establishing that principle are too many and the principle is too well settled to require any argument. I have cited some in the brief which we propose to submit.
There is here no clear showing of any right to equitable re-
822 lief, for the reasons I have advanced. There is here only an attempt, seven years later, by way of afterthought, to undo what the parties solemnly tried to do and did, in fact, seven years ago, and to cash in, in other words, on some specious legal theory that the parties could not do what they tried to do, and that it was illegal, and that they, these plaintiffs, are now entitled to get the money represented by the stock.

As to the immediate situation, bids have been received for the stock; the stock's present value is in excess of eight million dollars; and, unless restrained by this Court, the defendants will dispose of the stock as soon as possible.

The COURT. You might tell me your view concerning the loss the Maritime Commission would sustain, or the damage to the Maritime Commission, if this preliminary injunction issues. The damage is incident to the delay, as I see it; and what would be the fruits of delay?

Mr. SONNETT. I would refer, in that connection, to the short affidavit submitted by Admiral Land, who sets forth his estimate, first stating that the damages cannot be accurately estimated, but that in his opinion—and he, of course, has been chairman of the Commission throughout all the time the stock was held, and is familiar with the bids—that in his opinion the damage might exceed the sum of two million dollars.

The COURT. How?

Mr. SONNETT. Among the factors which enter into pos-
823 sible damage, if the Court please, are, first, the withdrawal of bids; secondly, the changing or possible changing of policy with respect to the future operations of this company; the possibility of serious loss of assets of the company at this time, arising from whatever maritime hazard any company faces. There is a field of ordinary business risk, in other words. We cannot say that there will be, certainly, a loss in that amount. We say there is a risk, and within the security provisions relating to injunction, we are of the view that all we have to establish is that there may be a risk of damage in that sum, not that there necessarily would be.

However, I would repeat again, if the Court please, that we are concerned far more with the insufficiency of the complaint than with the amount of security.

The COURT. I know.

Mr. HESTER. May it please the Court, I would like to take just a few moments to answer a few points Mr. Sonnett has raised. It is unfortunate Mr. Sonnett constantly refers to seven years. We, the plaintiffs, had no standing whatsoever to demand return of the stock, according to our understanding of the case, until the debts were paid; so that would throw out the laches or statute of limitations. And even if he should be right on the seven years, if the contract is illegal, estoppel and statute of limitations would not be applicable.

Mr. Sonnett made some reference to the fact that this
824 stock was worthless at the time it was transferred. We are prepared to prove, if permitted to go into the merits of this case, that it had a book value of some five million dollars at the time it was transferred.

Mr. Sonnett has made considerable reference to the contract. I would like to read two provisions here which he has not read. In the opening part of the contract, it states that each of the parties

will, "with all reasonable dispatch, do all of the things and take all the steps, acts, and proceedings, and execute and deliver all certificates, documents, instruments, and writings that it may legally do."

Section 14, which Mr. Sonnett didn't read, is a very interesting provision, and it says:

"* * * not shall any credits be allowed or given thereon, either as to principal or interest, by reason of the stock transfers or other consideration that may be received by the Commission under the terms and provisions hereof."

The COURT. Read that again, will you please.

Mr. HESTER. "Nor shall any credits be allowed or given thereon, either as to principal or interest, by reason of the stock transfers or other consideration that may be received by the Commission under the terms and provisions hereof."

The COURT. What does that mean?

Mr. HESTER. Well, that is one of the provisions that we rely upon in urging that the stock was taken as collateral.

825. Mr. Sonnett says some of the plaintiffs in this case were released from indorsements on notes, and that that is the satisfaction of the debt. The authorities that we will submit to you will show that that is not the case. The United States has no inherent power to accept stock in payment of a release of an obligation.

I didn't want to bring this up, but I am forced to do so by some things Mr. Sonnett has said here today; and I would like to say this, first: When he is speaking of the release of the plaintiffs from the notes, our position is, irrespective of how the contract may be construed, the plaintiffs were never legally released, because the contract was illegal. If we are permitted to proceed to a hearing on the merits, we are prepared to prove Mr. Dollar was forced into this contract; that the Dollar interests, the plaintiffs in this case, were forced by the Maritime Commission into this contract. Mr. Sonnett has offered today as an exhibit in this case a report made to Congress by the Maritime Commission in support of this transaction, and when your Honor reads that, he will see for himself the venom and the vindictiveness of the officials of the Maritime Commission in preparing that report and what they said to Congress.

Now, Mr. Sonnett, says that this is a shocking case. I agree with him; this is a shocking case. That is the worst I have

826 ever seen from the standpoint of unjust enrichment. And I don't believe it is so shocking—and he has made reference to this today in his argument—it isn't so shocking when a high-ranking official like the Comptroller General of the United States, who is supposed to advise Congress as to the way the

Government construes its laws and administers its laws, reported in 1940 to Congress that this transaction was illegal, was of doubtful legality, to say the least.

Mr. Sonnett has quoted today from some opinion of an attorney, an opinion I am not familiar with, who he said represented the Dollar interests in 1940. We didn't object to that, and in view of that fact I want to say this—and the Court will have to take my word for this, and I am willing to make an affidavit to this: Before I took this case, I went down to the Maritime Commission and discussed this with the highest legal authority, and I was told by that high legal authority that it was generally understood in the Maritime Commission that at the time this contract was made, the Maritime Commission had no legal authority to make it, but that since that time Congress had ratified it.

Mr. SONNETT. If it please the Court, I object to that statement.

The COURT. I sustain the objection, because I am not interested in that. What I would like to hear from you Mr. Hester, is on the question whether this Court has jurisdiction, which I
827 must say at this moment I doubt very much, because it does seem to me an action which would divest the government of property, and therefore a suit against the United States.

Mr. HESTER. This isn't a suit against the United States, your Honor; it is a suit against the members of the Maritime Commission. If this stock were owned by the United States, it would be a suit against the United States.

The COURT. Of course, it doesn't have to be literally, by name, a suit against the United States to be one in law; and if you are not prepared to discuss that now, it is all right. But in your memorandum I would like that discussed, because at this moment, although I certainly have not made up my mind about it, I have grave doubt of the jurisdiction of this Court, for the reason that it sounds very much like a suit against the United States.

Mr. HESTER. We will submit our points and authorities on that.

The COURT. Do you have any other argument you want to present?

Mr. HESTER. No; that is it.

The COURT. I was going to ask one question I think perhaps has been answered. Assume that I should conclude this is not, in law, a suit against the United States and that, therefore, this Court has jurisdiction. The arguments made here on the
828 motion for preliminary injunction would not necessarily dispose of the case, would they, because if the case goes to trial on its merits there will be factual questions to be explored? (To Mr. Sonnett) Do you agree with that?

Mr. SONNETT. If the Court desires a few minutes' discussion on that, I would be glad to offer it.

The COURT. I would like to have it, because it occurred to me this morning that for all intents and purposes, as a practical matter, you were trying this case here today, and that my action would probably be the end of the matter in this Court, whichever way I ruled, because I didn't see from the arguments this morning much possibility of the intervention of any factual issue. I rather assumed it was a question whether this contract said what it means; and, if it did, what did it say? Was it simply a construction of the contract involved? If that is so, then my action is going to end the lawsuit in this court. If it isn't so, then the question is whether or not it goes to the trial on its merits, providing I should hold I have the jurisdiction.

Mr. SONNETT. I submit, since the application for temporary injunction searches the record, that to sustain or grant a temporary injunction you must find a cause of action is stated.

The COURT. I agree with that.

829 Mr. SONNETT. I would suggest further, evene if your Honor holds this is not a suit against the United States and, therefore, this Court has jurisdiction, that the other points we have made are sufficient to establish the fact that the complaint does not state a cause of action and it therefore should be dismissed.

The COURT. I understand that. But suppose I overrule your view on all points, is there anything, then, to be tried by a trial court here, or would you in your hearing on the merits simply reargue the same propositions you have argued here today?

Mr. SONNETT. I don't think there is any genuine issue of material fact.

The COURT. Do you, Mr. Hester?

Mr. HESTER. We had thought that all we had to show today was a probable right and irreparable damages, for preliminary injunction.

The COURT. I think that is right.

Mr. HESTER. And then after you grant the preliminary injunction, the defendants would be required to answer our complaint.

The COURT. Yes.

Mr. HESTER. Then it might be we would want to offer testimony as to the intention of the parties.

The COURT. Yes. Well, that answers that.

830 Mr. SONNETT. I was about to say, if the Court please, I don't think counsel has yet pointed out any issue of fact which in the present state of the record before the Court has been raised. I don't think any such issue can be raised.

The COURT. Even on an ultimate trial?

Mr. SONNETT. Even on an ultimate trial.

The COURT. I will take the case, then. What have you filed?

Mr. SONNETT. I have filed three affidavits, if the Court please, in opposition to the motion for preliminary injunction. I should like to have leave to file a brief.

The COURT. You haven't filed that brief?

Mr. SONNETT. I have not yet filed a brief.

The COURT. Have you, Mr. Hester?

Mr. HESTER. No, your Honor; we haven't filed a brief.

The COURT. All right. How much time do you think you should have?

Mr. HESTER. Fifteen days, if your Honor please.

Mr. SONNETT. If the Court please, I see no necessity for any such length of time. The brief counsel referred to this morning was written at least a month ago, to my knowledge.

The COURT. What brief?

Mr. SONNETT. The brief to which he has made reference this morning and which is now in front of counsel.

Mr. HESTER. This is a brief, your Honor, we have used for administrative purposes and not for the Court. However,
831 if your Honor see fit to cut that time down.

The COURT. How much time do you want, Mr. Sonnett?

Mr. SONNETT. One day after receiving plaintiffs' brief. In other words, one full day. Two days after receipt of his brief, I can file my brief.

The COURT. Well, it may sound very simple, but it doesn't sound too simple to me, and I want to give you time adequately to present the matter. Can you do that in ten days, Mr. Hester?

Mr. HESTER. Yes, we could.

The COURT (to Mr. Sonnett). Then that isn't going to do you any great harm.

Mr. SONNETT. If the plaintiffs will supply additional security, I agree with your Honor.

The COURT. What additional security, for instance?

Mr. SONNETT. Well, Admiral Land has suggested, if the Court please, a reasonable amount would be two million dollars. That is an informed guess.

The COURT. I think it is a guess—and I haven't read his affidavit. But I wasn't, I must say, too much impressed with the reasons you gave me for increasing it. I can't see at this moment any basis for an amount beyond the cost of submitting new bids. I don't think there is anything before me but that.

Mr. SONNETT. There is the possibility, if the Court
832 please, that new bids when submitted may be substantially less than the bids are now.

The COURT. But that is just guessing all over the lot.

Mr. HESTER. Not only that, but here is the American merchant marine opening up, and this stock will appreciate.

The COURT. I would think so. It is like tossing a coin and calling it heads or tails. I called it heads the other day and it is a thousand dollars.

Well, ten days, Mr. Hester; and you can take such time after that as you wish.

Mr. SONNETT. I will be contented, if he takes ten, to take five, and file our brief within that time.

The COURT. I am not imposing upon you any time limit, because I think you are the one more concerned than I am with the time.

Mr. SONNETT. We will have our brief in, then, your Honor, within five days of receipt of plaintiffs' brief.

(Whereupon, at 2:15 p. m., the hearing of argument of motion for preliminary injunction was concluded.)

REPORTER'S CERTIFICATE

The foregoing record is certified to be a true copy of the official transcript of proceedings taken by the undersigned court reporter for the District Court of the United States for the District of Columbia.

Thomas O'Neal.
THOMAS O'NEAL.

I hereby certify this is a true copy of the original on file in the District Court.

JOHN F. SONNETT,
Asst. Atty. Gen.

833 In the District Court of the United States for the District of Columbia

Civil Action No. 31468

DOLLAR ET AL.

v.

LAND ET AL.

Transcript of proceedings

Filed Jan. 12, 1946

834 WASHINGTON, D. C.,
Thursday, December 20, 194..

FURTHER HEARING ON MOTION FOR PRELIMINARY INJUNCTION

The matter came on at 2:15 o'clock p. m., before Honorable HENRY A. SCHWEINHAUT, Associate Justice.

Appearances: For Plaintiffs—Clinton M. Hester, Esq., and Gregory Harrison, Esq. For Defendants—John F. Sonnett, Esq., Assistant Attorney General; and Paul Page, Esq., Solicitor, United States Maritime Commission.

835 PROCEEDINGS

The CLERK. Dollar versus Land, No. 31468.

The COURT. Proceed, gentlemen.

Mr. JESTER. If Your Honor please, I would like to introduce my associate, Mr. Gregory Harrison, who desires to argue the question of jurisdiction for the plaintiffs.

The COURT. I will be very glad to have Mr. Harrison do so.

Mr. HARRISON. May it please the Court, before presenting to the Court my argument in this matter, I would like to call to the Court's attention a matter which has arisen concerning the propriety of my presenting argument to you in this cause—

For a great many years the firm of which I am a member has represented the Reconstruction Finance Corporation as regional or agency counsel at San Francisco. In 1938 a loan was made by the Reconstruction Finance Corporation to the American President Lines. That loan as a matter of fact, is referred to in the contract which is the subject of discussion in this suit.

The suggested statement of facts does not, to my mind, convince me I should not present my argument. On the contrary, I believe my appearance is proper. But since it involves the propriety of my conduct in a cause pending before this Court, I would appreciate the opportunity to state the facts and ask

836 the Court to decide.

Prior to the transfer of the Dollar stock and during the closing of this transaction at San Francisco, California, the firm of Brobeck, Phleger & Harrison were counsel for the Reconstruction Finance Corporation. In that connection, the representatives of the Reconstruction Finance Corporation—and, in particular, Allard A. Calkins, Manager of the San Francisco Loan Agency, and Theodore R. Meyer, of the firm of Brobeck, Phleger & Harrison, being agency counsel for the Reconstruction Finance Corporation—participated in negotiations and conferences, and Mr. Meyer and Mr. Wright participated in conferences with counsel for the United States Maritime Commission.

Mr. Meyer and Mr. Wright approved agreements between the Maritime Commission and the Reconstruction Finance Corpora-

tion, and agreements between the Maritime Commission, the Reconstruction Finance Corporation, the Dollar Steamship Lines.

The so-called "Master Resolution" of the Reconstruction Finance Corporation, which is annexed to Admiral Land's affidavit here, provides, among other things, as a condition precedent to the making of the Reconstruction Finance Corporation's $2,500,000 loan, that agency manager and agency counsel shall receive evidence satisfactory to them that borrower's financial reorganization has been consummated, or satisfactory arrangements therefor have been made, substantially in accord-
837 ance with the terms and conditions set forth in and referred to in the Commission resolution—and it then proceeds to state what shall be included.

The Commission resolution referred to is the resolution of the Maritime Commission of September 27, 1938, which is in the record here, authorizing the carrying out of the contract of August 15, 1938.

It has never occurred to me that that loan of the Reconstruction Finance Corporation, which was approved as to form, which was made, and which has been fully paid, was involved in this case, even remotely. In this case we appear on behalf of suitors who seek the possession of shares of stock, in an action which is directed against the defendants in their personal capacity, the very foundation of which is predicated upon the contention that the United States is without interest, much less the Reconstruction Finance Corporation. I am unable to see, therefore, any connection between that loan, its approval and payment, and this suit.

The COURT. I can save you further discussion in the matter by saying I see no impropriety whatever in it. You had nothing whatever to do with the contract, the subject-matter of this suit.

Mr. HARRISON. That is correct.

The COURT. Very well; you may proceed.

Mr. HARRISON. May it please the Court, in the complaint
838 on file here there are a number of inaccuracies as to form. It is the desire of the plaintiffs in this case to submit tomorrow to counsel and to the Court a corrected or amended complaint which will cure all of those inaccuracies—which are as to form, not substance. And may I ask, therefore, that that be done and a copy presented to counsel for the Government and the motion to dismiss be considered to stand against the amended complaint?

Mr. SONNETT. I cannot consent to that, if the Court please, without seeing the complaint.

The COURT. I shouldn't suppose you could; but I am satisfied to have it presented with that understanding, and if it is purely a matter of form, I am sure the Government won't object to it.

Mr. HARRISON. This is an action brought by the plaintiffs to recover personal property which the plaintiffs assert title to and claim on, and which they allege is unlawfully withheld by the defendants in their personal capacity. The property in dispute consists of shares of stock in the Dollar Steamship Line, the name of which has been changed to and is known as the American President Lines, Limited. The action is ex delicto and the very foundation is the unlawful refusal of the personal defendants to return the property of the plaintiffs, after demand and refusal.

If this action, in which the defendants question the juris-
839 diction of this Court, asserting the immunity of the sovereign, the defendants have in their memorandum persistently referred to what they allege to be the conceded fact that the subject matter in dispute here is property of the Government or property to which the Government lays claim or property which they are holding possession of for the Government, or property which they assert they claim the right of possession of in behalf of the Government.

Throughout the statements of defendants it is clear that they claim, in effect, to be the Government, for the purpose of this suit.

The position of the plaintiffs is based upon the allegations of their complaint, which for the purpose of this motion must be deemed to be true in all respects. We will confine ourselves to those allegations for the purpose of discussing jurisdiction, for they alone are material to the Court's power to proceed.

In this matter it is the position of plaintiffs that the defendants have no authority from the lawmaking power, the Congress, to hold possession, to receive, to hold or sell, the shares of stock or the certificates representing the same, and that they have no authority from the lawmaking power, the Congress, to assert any claim of that character.

The COURT. May I interrupt you to ask whether you take the position that there is any statute which prohibits it?

840 Mr. HARRISON. No, Your Honor, we do not. We take the position there is no statutory basis for the claim; not that there is a statute prohibiting it.

May I contrast, in that respect, the position in which this Court finds itself and the position taken by the defendants here? This Court, in determining most carefully, in examining into its own jurisdiction, looks to the law which vests power in this Court to proceed. This Court is now diligently ascertaining whether there is warrant of power under the law for this Court to act in a judicial capacity and determine this issue.

The defendants, on the other hand, in substance assert that although they are unable to—and, by the way, in discussing juris-

diction, we are not referring to the concessions, the admissions, and the truths of the allegations of the complaint. These defendants in effect assert: "We need no authority. We need not search for our authority. We need not produce for you the warrant in the law, the statute enacted by the lawmaking power, which permits us to act in behalf of the Government in holding possession, in taking, it or in disposing of the property."

That, I think, is the crux of the question which is now before you.

Is it not the law, and clearly the law, that the defendants
841 in this case must produce, to support their cloak of sovereign immunity, an authority under the law, a statute enacted by Congress, which confers upon them as the representatives of the Government the right to act for the Government in asserting its claims on its behalf?

A brief statement of the facts in this case will clarify, I believe, the nature of the action. The allegations of the complaint show that for many years prior to 1924 the Dollar Steamship Line and its predecessors in interest had successfully carried on service in essential foreign-trade routes in trans-Pacific, and round-the-world services, among others. It shows that about 1923 that company purchased a large number of vessels, which were later augmented for the purpose of enlarging that service and increasing it.

In 1928, in pursuance to the Mail Pay Subsidy Act, the Dollar Steamship Line entered into contracts in pursuance of which nearly $16,000,000 in trans-Pacific liners was invested, for the purpose of availing itself of the law then in existence and in pursuance of which the Government undertook to pay mail pay for ten years, and for a like period the company undertook to maintain minimum service in essential trade routes.

In 1933, the depression having occurred which affected all American business in a manner only too well known to all of us, in a period of the worst financial depression the country has known, and with further difficulties arising out of the de-
842 clared or undeclared state of war between Japan and China, the Dollar Steamship Lines was in financial difficulty to the extent that the Commission, or its predecessor in interest, rather, was compelled to and did extend the maturity dates of the indebtedness to the Government then existing. As a matter of fact, that was no more than the policy of the law, the policy of statutes enacted at that time, contemplated. It was no more than the RFC was organized to do for business in general.

We then came to the year 1936, when the Merchant Marine Act of 1936 was enacted. That act, you will recall, provided that on June 30, 1937, all of the existing mail subsidy contracts should be

cancelled; that statute providing that those parties who suffered from that cancellation should have their remedy to settle claims for damages arising therefrom; and the Merchant Marine Act then providing that in the future the aid to be given to the American merchant marine would consist of operating-differential subsidies.

Although the contracts between the Government and the company thus were cancelled and terminated on June 30, 1936, no adjustment or settlement was made of the damage claims of the company arising out of the cancellations, and no operating-differential subsidy was granted to it until January of the following year—in the meantime the company necessarily maintaining service at heavy losses on all the scheduled trade routes.

843 In January a six months' subsidy was granted. It was granted in connection with the complete reorganization, in pursuance of which the following occurred:

First, the company was forced to discontinue and waive all claims for damages arising out of the cancellation of the ocean mail contracts, approximating six million dollars. The stockholders contributed $500,000 in cash to the capital. Creditors to the extent of approximately $3,000,000 surrendered their claims for stock. Trade creditors received partial settlement in cash, part in deferred payments, and part in stock. And the Maritime Commission exacted the undertaking that henceforth the directors would be those approved by the Commission itself.

With this rearrangement of the company's affairs completed in April of that year, with control of the directorate in the hands of the Commission, with these large additions to the capital, it might have been assumed that thereafter the operating-differential subsidy would continue to be paid. Instead, when that expired, in June of the same year, an additional operating-differential subsidy for the future was not granted. Instead, the company, prior to August 15, 1938, was presented with an alternative, and the stockholders were likewise so presented.

The alternative was, on the one hand, an immediate enforcement of all obligations owing to the United States, with
844 no relief in the form of a subsidy. That alternative, according to the language and statement in the record of the Commission itself, meant enormous loss to the stockholders, it meant loss to trade creditors, it meant a discontinuance of service into essential trade routes, with the resulting damage to shippers and consignees, and an irreparable damage to those employed as well as those otherwise interested in the company.

The other alternative was the contract of August 15, 1938; and that contract, so far as it is material to this cause here, consisted in a transfer, an agreed transfer, by the stockholders representing

some 92 percent of the voting stock of the company, of that stock to the Commission.

It represented, number two, a purported release of two parties on a portion of the indebtedness, as guarantors or accommodation makers of notes to the United States. And, other than that, a careful perusal of the contract will find no change in the situation. There was no release of any indebtedness, no elimination or reduction of any indebtedness. The shares were so transferred, free and clear of all incumbrances, to the Commission. And the Commission held those shares free and clear of all incumbrances until September of 1943, at which time or thereafter, all of the indebtedness existing on August 15, 1938, and prior thereto to the Government had been fully paid, satisfied, and discharged.

845 Nevertheless, upon demand for return of the stock, the Commission members have refused to return it, asserting that they were authorized and under the contract entitled to receive not only payment of all sums due the United States in full, but also entitled thereafter to retain indefeasible and absolute title to the shares transferred—and, if you please, to dispose of them by public offers—rather than redeliver them to the plaintiffs.

The position of the plaintiffs in this case, supported by the admitted allegations of the complaint, is this:

First, that the contract itself, which was made August 15, 1938, actually in fact and in law transferred and conveyed to the Commission on behalf of the United States a pledge or a title as collateral to the shares only; and that when that contract was fully performed and all of its obligations satisfied, on at least some time after September 1943, that contract disappeared, as far as any relations between the Government and these plaintiffs are concerned; for, the principal debt having been paid, the Government no longer had any interest in the stock, and these defendants withhold it without any color of right, under contract or otherwise.

The COURT. Mr. Harrison, the contract on its face purports to be an absolute delivery of title; it purports to convey an absolute title, doesn't it?

Mr. HARRISON. If the Court prefers that, I will address
846 myself to that point at once.

The COURT. Do it in your own time; but I would like to hear you on it, because as I read it, I just don't get a pledge out of it in its terms.

Mr. HARRISON. Yes, Your Honor. The contract itself and the quotations in the brief of the defendants, referring to it repeatedly, in numerous parts provide that the stock shall be transferred free of all liens and incumbrances. The indorsements themselves are indorsements which upon their face transfer the title to the shares

of stock. However, the Court has said that there is nothing in the contract to indicate that they are a pledge. May I say, however, by the same token, that there is nothing in the contract to indicate that they are not a pledge; and the mere fact that legal title to property of any character, whether it be real property or personal property, has been conveyed to an individual, does not interfere, when the entire transaction is regarded, with the conclusion that it is transferred as security only.

If there were any doubt about that question—there being no specific provision one way or the other in the contract—we would be entitled to resort to the contract as a whole first and to the ordinary rules of statutory interpretation, to determine the legal effect of the contract.

In the contract itself, in the first place, there is the provi-
847 sion that the parties intend to do only what they are legally able to do. We will presently present to you our views concerning the authority of the Commission to take anything but a qualified title. If it be true—and we will presently prove to you as we believe it is true—that the Commission had no power on August 15, 1938, or later, to take title, to take other than a qualified title, then under that specific provision of the contract they took none.

Independent of that provision of the contract itself, where the power of the Commission, under the law, extended only to the taking of collateral or a qualified title, the making of any contract by which if would take more was of no significance whatever and the contract must be interpreted, under well-settled rules of statutory construction, to conform to the law.

And where the law vested in the Commission a limited power, and where the contract is susceptible of such construction, then the contract means that only that qualified title was taken—because the courts will be reluctant to impart to a contract a meaning which is illegal or in excess of the authority of a public officer to make.

It is a well-settled rule of construction that where there is any doubt concerning the meaning of a contract, the court will avoid a meaning which is burdensome, oppressive, or unjust in its results, or which has a confiscatory result.

In this case, the interpretation which would be placed
848 upon this contract would mean that the Government of the United States intended to and did and does now intend to acquire not only these shares of stock but full payment of every obligation which existed at the time the transfer was made. The burdensome and unjust result of that interpretation is that the stockholders in this case must stand by and see every debt and obligation owing to the Government paid, and must at the same time surrender their property consisting of their equity in the company.

The courts as a rule of statutory construction have said that the laws that exist at the time the contract is made will be read into the contract. The law at the time this contract was made plainly limited the jurisdiction of the Commission to the making of title to property only under section 207 of the Merchant Marine Act, taking title to improve or protect or preserve the collateral then held by the Commission as security for the payment of obligations. That limited authority is then a part of this contract, and the contract will be so interpreted.

In making those statements, may it please the Court, I assure you I am not indulging in any reckless conclusions of my own. Each of those statements has been stated and upheld by the United States Supreme Court. I refer, for example, to the case of Great Northern Railway against Delmar Company, in 51 Supreme
849 Court at page 579, holding that courts will adopt the construction of a contract which validates it, rather than the alternative invalidating the contract. And we assert that under the law, under section 207 and the other sections of the Merchant Marine Act, this contract will be validated in whole if this contract be read, as of that date and now, to convey a qualified title for the purpose of security only, and that to read it any other way necessitates holding it is, in part at least, invalid under the law.

The Supreme Court has said, in Noonan against Bradley, in 76 U. S. 394, that when an instrument is susceptible of two constructions, one of which works injustice and one of which is consistent with the right of the case, the latter will be favored.

And in this situation you are to impart to this contract a construction the necessary meaning of which is that the Government intended and authorized these defendants to act in such a manner that the Government would receive not only full payment of all the money owing to it, but the property of these plaintiffs as well. That is what the defendants ask.

The Supreme Court has said that the laws governing a contract, which exists at the time and place of its making and where it is to be performed, enter into and form a part of it, as if they were expressly incorporated into the contract itself. I refer, for example, to Brine against Hartford Fire Insurance Company, 96 U. S. at page 627.

850 The Supreme Court has held that a contract should not be construed as providing for an unreasonable forfeiture, if its language admits of a more equitable interpretation.

So we say that this contract, fairly read, in light of the appropriate rules of interpretation—read by the four corners, read in light of the law which existed when it was made, read in light of the authority which the lawmaking power conferred upon these defendants as commissioners, read in the light of the equity—

means that the transfer of title, although unqualified in form, although neither referring to nor repudiating an intent to create a pledge, must be so read and the contract so enforced that the contract becomes valid, reasonable, equitable, and was completed, in respect to its performance in September of 1943. And so construed and so read, there is no contract before you today which could on any theory form any basis for a claim, a right, of the defendants to retain these shares.

We assert, then, that there is no contract in this case at all. Our suit is to recover property rightfully held by agents of the Government, under authority of law, until September of 1943, and wrongfully withheld, without authority of law or contract, today, notwithstanding demand and refusal for delivery.

This case is a case in tort. It is a case ex delicto.
851 It is a case to recover property unlawfully withheld, without warrant of authority.

Let me again point out to you, however, that the jurisdiction of this Court is based upon a second well-substantiated ground. It is this and this simply—that these defendants, although presuming to cloak themselves with the veil of sovereign immunity, have been unable and are unable, to direct this Court's attention to any provision enacted by the lawmaking power permitting them to assert this claim or permitting them to hold possession for the Government, or, if you please, permitting them to sell this property for the Government.

These defendants cannot, by simply coming into this Court, stay the jurisdiction and the action of this Court by their simple statement that, as agents of the Government, they act for the Government, because, acting for the Government—just as this Court does—they must act under the law. And until they can offer to you their warrant of authority for a claim which they make here, for a contract which they claim they have made in the past, for their possession, for their right to sell, they stand before you as individuals, not as the Government.

Proceeding to a discussion in the reverse order, if I may, may it please the Court, the grounds of jurisdiction upon which we first wish to refer to the appropriate authorities, are that these defendants do not have, under the law, any right to
852 possession on behalf of the United States, or any right to claim possession or title on behalf of the United States. They are, therefore, personal defendants. If they are without that authority, they were without it in August of 1938, and they could not create that authority by making a contract not authorized under the law. They could not create it by press releases. They could not create it by intention. For if administrative officers could create power by writing contracts, the law would mean

nothing. Their authority would be limited only by the contracts they could make and not by the law.

Obviously we would be in a serious quandry if press releases could create authority; for I assure the Court I alone know of millions of press releases, and I am sure the Court does.

And even their intentions, however good, however sincere, however profound, cannot be used as a substitute for the law itself.

The COURT. I think I can take judicial notice of that.

Mr. HARRISON. And so when the defendants in their authorities assert cases like Metropolitan Trust Company against McKinnon, in 172 Federal 846, and other cases to the effect that an agent's title is the title of his principal, and an agent's act is the act of his principal, they are dealing with cases where the prin-
853 cipal has either granted the authority or, by ratification or adoption, has made the act of the agent the act of the principal.

But here the very gist of this action, may it please the Court, is that the principal, the sovereign power of the United States, represented by the Congress and the lawmaking power, has never created this agency, has never conferred this authority, and has never ratified the acts or claims of these defendants. And so we can see no relevancy to cases of that character.

We think that the situation we have here is well illustrated by a discussion to be found in the case of United States against Ferguson, in 78 Federal 103, that being a suit in which the Postmaster General held certain funds. It seems these funds represented what one of his subordinates had extracted from the person of a thief who had stolen money from the post office.

The inspector, having extracted these funds from the thief, turned them over to the Postmaster General. The thief, when he was prosecuted, assigned that money to his counsel, and the counsel sought to recover it from the Postmaster General; and he was awarded the money, even though it was then in the possession of the Postmaster General. For, as the court said—
854 "* * * the inspector had no authority, under the laws of the United States, or no color of authority, to take into his possession and assume to retain money belonging to Atwood"—Atwood being the thief—"even though Atwood had stolen an equivalent sum of government moneys from a post office."

The court pointed out that—

"So long as the money was in the hands of the inspector, or of his superior officer, the Postmaster General, there was no claim against the United States, and only one against the officers

of the government, who had transcended their authority and made themselves individually liable for the consequences.

855 And the position of the plaintiffs here is that in asserting title after the debt is paid, in claiming title today, in claiming the right to possess, they have transcended their authority, for the lawmaking power never conferred it upon them.

We believe that the case of United States against Lee is controlling in this case. That was a case decided in 1882; it was reported in 106 U. S., page 196. In that case, may we point out to the Court that the facts are, so far as we can see, in every essential detail identical with the facts in this case. In that case there was a suit which involved the possession of certain property in Virginia. The property was in the possession of officers of the Army in connection with a national cemetery. It had been in the possession of agents of the United States for upward of ten years. It was claimed by these agents as officers of the United States and not in their individual capacity. It was claimed in pursuance of a certificate issued by a commissioner who in turn was acting under a statute of the United States and who executed a certificate or conveyance of the lands to the United States.

In the first place, then, we have in both cases this: A plaintiff suing ex delicto for the withheld property. We have in that case defendants who were officers of the United States Army, and in this case members of the United States Maritime Commission.

There the officers of the Army asserted they were
856 acting on behalf of the Government and asserting a claim on behalf of the Government. The same defense as to jurisdictions is made here.

In that case the property not only was in the possession of these agents of the Government, but had been for more than ten years. Here, again, mention is made of the fact that this property has been in the possession of the defendants, as agents of the Government, and has been for some seven years.

In this case it is said that there was a contract which could be interpreted as giving color of authority. In that case, the agents of the Government were holding on a conveyance to themselves and on a conveyance executed by a commissioner of the United States in favor of the United States.

Nevertheless, although the facts are entirely parallel, the Supreme Court of the United States held that those defendants were acting in their individual capacity, that the suit was one to recover possession ex delicto, and that since these officers were holding under an invalid title, since they were acting without any warrant in the law, possession must be restored.

And in that case, as in other cases following United States against Lee, the Court pointed out that the United States was not a party to such a suit, that it had no interest in the suit whatever, that the determination of the right to possession between
857 plaintiffs and defendants was no bar to a subsequent suit by the United States or to any subsequent claim that might be authorized on its behalf. But that in the then condition of facts, to-wit, defendants asserting they were acting as agents of the Government, but without authority in the law, that they could make no claim for the Government, they could not retain possession for the Government, and consequently the judgment went for the plaintiffs—as it should in this case, upon an identical set of facts.

It has been suggested that there are limitations that have been placed upon this case. It has been suggested that the fact of possession delivered here to the defendants distinguishes it. But in the Lee case the possession was peacefully delivered to the defendant officers under a conveyance.

In the case of Tindal against Wesley, in which there is a limited discussion of this same subject, we again find that the officers of the United States had been continuously in possession of the disputed property. As a matter of fact, in that case the possession of the property had never been in the plaintiffs. It was property of the State. The State, in pursuance of a statute, had provided for conveyance of such lands upon compliance with certain proceedings. The Court held that the plaintiffs there had complied with those proceedings and with the statute, and nevertheless officers of the State in that case were refusing to deliver possession.
858 It held they were acting without any warrant of authority under the law; that they had transcended their authority. It was held it was, therefore, a perfect action against them in tort for recovery of land. And the Supreme Court upheld that judgment.

Again, in the case of Stanley against Schwalby, at 147 U. S. 508, we have a situation in which officers of the United States Army had long been in possession of land, had been in possession of it for a great many years. Again the plaintiffs, alleging title, brought suit against them in their individual capacities to recover the property. There, again, the plea was made that this property was in the possession of agents of the Government. There again the plea was made by the defendants that they were asserting a claim on behalf of the Government; and in support of that claim they introduced deeds and proved themselves, or claimed to be, innocent purchasers for value on behalf of the United States. Notwithstanding that, the Court held these de-

fendants were in their individual capacities acting without authority under the law; that the judgment there did not bind the Government; that the Government had no interest in the issue; that they were without authority to represent the Government—and the Supreme Court upheld a judgment of recovery.

An interesting development in the Stanley against Schwalby case is that in a later decision of the same name, the issue of title as between the Government and the individuals arose.
859 It arose in this way, that in a suit to recover the land, the same character of land, in fact, the same land as was involved in the prior suit, the defendants asserted they had occupied the land and for the statutory period, as adverse possessors, and that having done so, a title by adverse possession was created, and they asserted that title of adverse possession on behalf of the United States. The Supreme Court permitted them to do that and gave judgment for them. For, said the Supreme Court, since these officers of the Army were wrongdoers, since they were transcending their authority, the plaintiffs had always a right to recover this property in an action ex delicto. But having refrained from doing so, and the officers having occupied the land under a claim of right, the Government was entitled to prevail.

The same results happened in the case of Hussey against the United States, 222 U. S. 88. And so throughout these cases, from the beginning until now, it has been consistently held that United States against Lee represents the law. It represents the law, that in an action by plaintiffs against defendants as individuals, the mere fact that those defendants claim authority to represent the Government, the mere fact that they happen to be agents of the United States, the mere fact that they claim under documents which are invalid, does not alter the character of the action as between individuals, does not entitle the defendants to any
860 sovereign immunity, and, where the plaintiffs have established their right to the property, entitles them to relief in a suit for that purpose. The distinction between that and the case cited by the defendants is readily determined from the cases which the defendants cite.

In an effort to demonstrate that there is involved in this case a question of title, as between the United States and the plaintiffs, the defendants have referred to a series of cases. One group of cases is Louisiana against Garfield, Oregon against Hitchcock, Nagamab against Hitchcock, Minnesota against Hitchcock, Morrison against Work—in each of which, without exception, there was involved lands the titles to which were admittedly in the United States itself.

In one group of cases which is exemplified by the Louisiana against Garfield, the State of Louisiana proceeded for the purpose of quieting title to lands of the United States which the State of Louisiana asserted had, under statutes of the Federal Government, become vested in it as swamp and overflow lands. There was no claim in that case that any officer had exceeded his authority under the law. There was no claim in another case but that the Secretary of the Interior was complying with the positive acts of Congress in all respects. And in the case of Louisiana against Garfield, as in every other familiar case, the courts have held that you cannot come in and seek to quiet title against
861 the United States and assert that you are doing anything but suing the United States.

There is no attempt to quiet title against the United States here. There has been on injection in this case of any issue in pursuance of which this Court is asked to foreclose any rights of the United States. All that is involved in this case is the remedy against these individual defendants who withheld property unlawfully and without warrant or authority under the law.

In other cases such as Naganab against Hitchcock and Minnesota against the United States, there were attempts to invoke the aid of the court to direct the Secretary of the Interior or other Government officials as to how they should administer Indian lands or Indian funds. And the Court held that obviously they were lands and moneys of the United States, as to which there was no dispute at all, and that all the plaintiffs were seeking to do was to interfere with the administrative duties of public officers in the performance of their statutory functions.

We are not asking this Court to interfere with any function or duty of any officer under the law. Instead we assert that these defendants cannot and have not produced a scintilla of authority under the law to hold the stock, to claim the stock, or to sell the stock—and thus they stand divested of any immunity.

Other cases are cited by the defendants, such as the case
862 of Goldberg against Daniels, and Wells against Roper. In the former case a suit endeavored to invoke the aid of a district court to compel the Secretary of the Navy to deliver to him a battleship, because he was the highes. bidder. And the district court properly held that all that was sought was to compel this officer of the Government to enter into and perform a contract.

In Wells against Roper the court held it wouldn't give relief by enjoining the Postmaster General from annulling a contract—because in both cases, all that was being asked was that a contract be enforced and that property, either in the form of a battleship or of funds in the Treasury, which were admittedly the property of the United States, be delivered—creating necessarily an issue

in which the sole question was, one, the performance of a contract with the United States; two, the delivery to plaintiff of money or property admittedly of the United States.

In neither of those cases was there the slightest protension the officer was using in excess of his authority under the law. In neither case was it claimed he was not performing a public function under the statute. It wasn't claimed he could not invoke the sovereign immunity, because the sovereign had not authorized him.

And in those cases which have been cited by defendants, the courts have consistently and regularly distinguished
863 between such cases and the cases like United States against Lee, upon which the plaintiffs rely.

For example, in the case of Morrison against Work, that you will recall, was one of the cases in which it was admitted that the lands involved were the property of the United States and the question involved was as to whether the disposition of those lands was a matter which was subject to the court's jurisdiction. And the Court said there:

"The case at bar is unlike those in which relief by injunction has been granted against the head of an executive department, or other officer, of the Government, to enjoin his official act on the ground that it was not within the authority conferred, or that it was an improper exercise of such authority, or that Congress lacked the power to confer the authority exercised. In those cases the act complained of either involved an invasion or denial of a definite right of the plaintiff, or it operated to cast a cloud upon his property. In some of those cases the defendant would have been liable individually in trespass unless he could justify under authority conferred. Morrison and the other Chippewas have no right of that character. The lands ceded are the property of the United States. It has, confessedly, power to dispose of them."

864 And in the case of Jumel——

The Court. I know the case—Louisiana against Jumel.

Mr. Harrison. In the case of Louisiana against Jumel, as I recall it, may it please the Court, there was an attempt to enforce a contract with the State, a contract authorized by statute, calling for issuance of bond at a certain rate of interest, and with a given form of tax rate attached thereto. Subsequently by amendment to the constitution of the State, new rights were conferred, the interest rate was reduced, and it was provided that the taxes should be diverted to another purpose.

Obviously they were dealing there with the moneys of the State of Louisiana. The attempt was made to ask the court to compel the State to make another and different disposition of the

property from that which the lawmaking power of the State had directed; and it said, and plainly said, that it wouldn't compel officers of the State to deviate from the laws of the State.

We do not ask that here. We ask that these defendants be treated as individual defendants, not to compel them to disregard the laws of the nation; but to treat them as individual wrongdoers, because they act without authority under the laws of the nation.

In the case of Cunningham against Macon, which was a case where a State attempted to impose a lien, a tax lien, upon
865 property of the Government, it was held this necessarily involved a dispute between the State and the Federal Government. But while properly holding that that was true, again the Supreme Court said:

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the Government."

And that is the only possible defense in this case.

Continuing, the Court said:

"In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him."

866 And we assert again that it is impossible in this case for the defendants to point out the law which will protect them against this cause of action against them for the recovery of these shares or the certificates representing the same. In that connection it is important, we believe, to point out to the Court that this is the only remedy which the plaintiffs have.

The COURT. Why haven't you a remedy in the Court of Claims, on the theory that if they hold it was without right under the present situation, there is an implied contract to return it or an implied contract to pay for it?

Mr. HARRISON. Because, may it please the Court, that right can exist only where there is a contract which is made by authority of the Government; and that where, as here, the acts of the defendants are without authority under the law——

The COURT. Has the Court of Claims no jurisdiction under an implied contract?

Mr. HARRISON. Unfortunately not, may it please the Court; and I would be glad to cite the cases to you on that subject.

The COURT. No; I don't think it is necessary really to go into it, because it wouldn't have anything to do, one way or another, with the jurisdiction, or would it?

Mr. HARRISON. Well, I think it might for several reasons.
867 In the first place, one of the underlying reasons assigned by the Supreme Court for the law it has developed is because of the fact that if the law in United States against Lee be overturned, it would in a case of this kind leave the United States without any remedy whatever; and an officer of the United States, on his own and without authority of the law, could misuse your property and you would be wholly without remedy, simply because he claimed to be acting for the United States.

This, may it please the Court, is a case where the officer is without statutory authority for what he does. Now, were this a case in which the defendants were admitted to be acting under authority of the law and to have taken this property, they might well create an implied contract to pay the reasonable value thereof to the plaintiffs. But where the defendants are acting without authority of the law, they are acting ex delicto; and where they do, there is no liability in the Government to pay the reasonable value of the property.

The COURT. Even if they act believing they do so under authority of law?

Mr. HARRISON. Correct, Your Honor.

In the case of Pledger against United States, cited by the defendants themselves, that was an action in the Court of Claims. It was an action in which the plea was for the payment of the reasonable value of a steam shovel, not in pursuance
868 of a contract, but upon the claim the Government had erroneously relied upon a contract in taking possession. The Court of Claims held—and the Court of Claims was upheld by the Supreme Court—that since the Government officials took under the terms of the contract; that since they, under the authority of law, retained possession, they were obliged to pay under the terms of the contract itself.

But, said they, this man who seeks to recover the reasonable value thereof, can only prove his right to recovery on the ground that this contract does not give a right to the officer to act; and in that case, said the court, it would be a tortious act, and he would have no right of recovery in the Court of Claims at all.

Specifically quoting the Supreme Court in Klebe against United States, 263 U. S. 188, cited by defendants, in disposing of the attempt of plaintiff to recover the reasonable value of property alleged to have been unlawfully seized, the Court said:

"If the Government's claim is unfounded,"—that is to say, its claim it had a right under the contract to retain the property and pay the contract price—

"If the Government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any,

is one sounding in tort; and for such, the Tucker Act affords no remedy."

869 In the case of United States against Goltra, in 312 U. S. at page 270, the case is interesting because it, together with Golltra against Weeks—also cited in the brief for plaintiffs in this case—gives the whole history of a dispute so similar to this that it is striking. You will recall that in Golltra against Weeks, Army officers of the United States had claimed that the terms of a charter party of certain tugboats operating on the Mississippi River had been violated and they were entitled to seize possession of the boats, and they did so. The charterer brought suit upon the ground that this was an unlawful taking of the property; and the right of plaintiff was upheld by the United States Supreme Court, which found that since the contract gave to the officials of the Army no right to the seizure, they were acting without authority under the law, their conduct was tortious, and possession of the boats chartered was surrendered to the charterer.

However, you will realize that in the interval these boats had been in the possession of the Engineers, and consequently in that period a loss had been suffered. For that loss, however, there was no remedy, had it not been that Congress passed a special enabling act permitting the plaintiff in that case to pursue his remedy in the Court of Claims for the reasonable value of the use of the boats during the unlawful seizure."

870 The Supreme Court there said, among other things, that this was not a taking by eminent domain. It said the distinction between property taken under the authorization of Congress, and property appropriated without such authority, has long been recognized. That acts of Government officials in taking property without authorization of Congress conferred no right of recovery upon the injured citizen.

Again, in the case of Pierson against the United States, on 267 U. S. at page 427, there the Government had leased certain land and under the lease there was specific authority for the United States to place improvements thereon, but the provision concerning what should be done with respect to the improvements on the termination of the lease. The Government officers removed the property and refused to pay therefor. A suit was brought for the reasonable value thereof, and relief was denied, the court saying the petition showed no ground of recovery on an implied agreement on the part of the Government to pay the claimants for property taken for public use; that no recognition of the plaintiff's title was alleged in the petition; that, on the contrary, the facts shown plainly indicated that the buildings and improvements were removed by the Government as its own property under the color of right.

The court said that under those circumstances no agreement to pay for them could be implied, and whether the
871 Government's claim was well or ill founded was immaterial. If it was ill founded and the claimant's property rights were violated, the cause of action therefor would be one soundly in tort, for which the Tucker Act affords no remedy.

In other words, may it please the Court, the very basis of jurisdiction in this case is the lack of authority under the law of the country, for the defendants to retain the possession of or assert these claims. That means that the Government itself owes no obligation to these plaintiffs. It means that the sole obligation is of the defendants themselves in their individual capacities. And for their wrongdoing, not authorized under the law, there is no provision for recovery in the Court of Claims.

Had, on the other hand, the Government empowered these defendants to exercise the power of eminent domain, we would have had our right to recovery either under the law or the Constitution. And even if the act of Congress did not provide for reasonable compensation, but otherwise empowered these officers to act, then the right of action against them could be founded solely upon the ground that the act of Congress is unconstitutional.

The fact remains, however, we cannot recover in the Court of Claims so long as we rely, as we do here, upon acts of these defendants ex delicto performed without authority of law.
872 I think, may it please the Court, that the statute creating the Court of Claims and vesting it with jurisdiction is fairly plain itself. I am sure there is no dispute in the authorities that a tortious act of defendants is never the basis for an implied contract on the part of the Government to pay the reasonable value thereof.

And so we stand before you with no remedy but this. We stand before you relying upon this long line of cases, numerous examples of which appear in the plaintiffs' brief, in which the doctrine of United States against Lee has never been questioned. As a matter of fact, the suggestion in the memorandum of the defendants here that some doubt has been cast upon that doctrine is so far from the fact, that in the quite recent case of Kiefer & Kiefer against Reconstruction Finance Corporation, reported in 306 U. S., Mr. Justice Frankfurter, speaking upon the general subject of immunity, said—and, incidentally, said it, citing United States against Lee—that far from its being a fact that there was a tendency to extend the doctrine of sovereign immunity, instead he said that the climate of opinion today, and the legislative policy of Congress at this time, is in the direction of limiting, not extending, this doctrine; and that the liberal policy of pro-

tecting the rights of suitors so that they may have their day in court, is the end being sought by Congress rather than its limitation.

873 There have been cases cited here which I confess I find great difficulty in applying to this case itself, even remotely. I say without serious fear of contradiction that even in the cases cited by the defendants, the doctrine of United States against Lee is constantly referred to and accepted. There are references in the memorandum of defendants to the case of Lincoln Electric Company and the Mine Safety Appliances Company, the latter of which was the subject of a very recent opinion by the Supreme Court of the United States. And I can think of no decision, in a case dissimilar from this, which has more clearly stated the doctrine and which more clearly upholds the jurisdiction of the Court in this case.

That was a case in which you will recall, may it please the Court, there was an attempt to enjoin an officer of the Government from performing his responsibilities and duties under the Renegotiation Act. What he had done in this particular case was to direct another officer of the Government to withhold payments upon other contracts, as set-offs against what would otherwise be due to them under the contract renegotiated.

The suit, therefore, was upon the contracts from which deductions had been made in the amounts due. The lower court, as well as the Supreme Court, held that there was no right to entertain the suit. It held it upon numerous grounds. In the

874 first place, it held there was no right to entertain the suit, because what the plaintiffs were seeking to do was to compel officers of the Government to pay out funds of the Treasury under the terms of a contract which they were seeking to enforce. There was a naked claim for moneys due under the contract, obviously enforceable in the Court of Claims and obviously related to compelling the performance of a contract to which the United States and the plaintiffs were parties.

There was no claim, in that case, that with respect to the performance of their duties, the defendants were acting otherwise than under the terms of the law itself. There was no claim that their action was unauthorized under the law.

The COURT. The claim was that he was acting under an unconstitutional law, wasn't it?

Mr. HARRISON. True. But the relief sought, may it please the Court, wasn't to attack action under an unconstitutional act. The relief sought was to collect the balance due under contracts from which deductions had been made at the request of the officer conducting the renegotiation. The nature of the remedy, therefore,

was one to recover the balance due upon that contract; and that necessarily involved, first, a money claim under the contract against the Treasury; secondly, the performance of the contract by the United States; and, third, the taking of property from the Treasury which was admittedly property of the United States.

875 In every single instance we have a condition which does not exist here. We seek no money. We seek no payment from the Treasury. We seek here merely to have our property returned to us—property which we assert is withheld by these defendants without authority under the law.

Might I point out to you that in discussing this case the Court said the appellants contend that the action seeks to prevent a tort by the Secretary, acting as an individual and not as an officer of the Government, consisting of a trespass against appellants' property. That is our claim here, may it please the Court.

The Court continued, saying that equitable relief is necessary because appellant has no adequate remedy otherwise—and that is our claim here.

The Court went on to say that the complaint, as filed, in the absence of any further proceedings, provided a basis for the equitable relief sought. And he cites Philadelphia Company against Stimston, which in turn is directly based upon United States against Lee.

May we turn from this language to the complaint in this case, may it please the Court? We assert that a tort has been committed here by the members of this Commission. We contend they are acting as individuals and not as the Government. We contend that their conduct consists of an unlawful withholding of our property, and that equitable relief is necessary be-

876 cause not only is there no adequate remedy, but there is no remedy whatever at law.

Now, having established this case as being literally within that language, the Court goes on to say:

"For according to these cases, if we assume that appellants' allegations, including the one that the Renegotiation Act is unconstitutional, are true, the fact that the Secretary had acted pursuant to the commandment, should make no difference whatever"—and in that case it made no difference whatever, because what the plaintiff sought to do was to recover upon a contract as to which the contract renegotiated had no relationship whatever. All that he was seeking was to compel the Secretary of the Treasury to disburse from the Treasury the balance due upon that contract.

We see no such remedy here. We have no contract here. We have a tortious withholding, without authority under the law.

The Court, after stating that the Government's essential interest, in determining whether it is an indispensable body, must be determined in each case by the nature and effect of the proceeding as it appears in the record, then cites an ex parte case. It might just as well have cited the cases cited here by the defendants, cases in which there was no question that either there was property of the State involved, or there was an attempt to recover
877 money from State treasuries; for in that particular case it was the attempt of the suitors to recover from the State of New York, indirectly, upon obligations recognized by the State of New York, by appropriations for damages done by vessels operated by its authority.

In none of those cases was there any question of the authority of the defendants to act, as there is here. In all of those cases there was an attempt to collect funds from the treasuries, upon many grounds, such as the performance of contracts.

There they were attempting to secure funds from a public treasury. Here we are attempting to recover property which has never been in the public treasury, which is still in the hands of these individual defendants, and is in their hands without any warrant of law to hold it or claim it for the Government.

Going on, the Supreme Court said:

"Nor does the record present any other circumstances that would make the Secretary sueable as an individual * *. *, certainly when the action the Secretary proposed to take is not a violation of any express command of Congress. The sole purpose of this proceeding is to prevent the Secretary from taking a certain action which would stop payment by the Government of money lawfully in the United States Treasury, to satisfy the Government's and not the Secretary's debt to the appellant."
878 In other words, the gist of the action was a suit upon the balance due upon a contract between the suitor and the United States itself, and the remedy was the payment from the public treasury of the balance due upon that contract.

Here we bring no suit upon a contract. Here there is no contract in legal effect. Here there is no authority at law. These defendants act solely in their individual capacity, without the protection of authority conferred by the Government at all.

"The assumption underlying this action is that if the relief prayed for is granted, the Government will pay and thus relinquish ownership and possession of the money."

And again we reiterate that is not the situation here.

The Court went on and said that in effect this was an indirect effort to collect a debt allegedly owed by the Government in a proceeding to which the Government has not consented. And may I point out that the very brief concurring opinion of Mr.

Justice Reed stated that in his view a legal remedy exists in the Court of Claims.

In other words, in that case the Supreme Court had before it a suit for a money judgment, being the balance due upon a contract and nothing else. It did not have before it an officer claiming to act for the Government in withholding the property of suitors, as was the case in United States against Lee, in
873 Stanley against Schwalby, in Correa against Barbour, and finally in Blondet against Hadley.

Your Honor will perhaps recall in Blondet against Hadley there was a distinction drawn between, on the one hand, an attempt to quiet title against the United States and, on the other hand, a withholding unlawfully by an officer of the United States of the suitor's property. The court there pointed out that it could not quiet title at the instance of a citizen against the United States, for that necessarily involved the rights and interests of the United States, and created an issue with the Federal Government. But in the very same suit in which the same court so held, it held, as the Court should hold here, that where the relief sought is to take possession from an officer acting without authority under the law, and to restore it to the rightful owner, the plaintiffs, the Court not only has jurisdiction to do so, but should exercise that jurisdiction favorably.

Now, I concede, may it please the Court, that that entire argument of ours is predicated upon one essential thing, to-wit, lack of authority. I agree that if the defendants in this case can produce for this Court an authority for that which they have done, under the law, then this Court lacks jurisdiction.

The COURT. Let me ask you this, and you can either answer it now or whenever you want to: They did, you concede, have authority to accept collateral?

880 Mr. HARRISON. Correct.

The COURT. They would have had, therefore, the authority to accept this stock as collateral.

Mr. HARRISON. Correct.

The COURT. If the indebtedness was unpaid, they could dispose of the collateral.

Mr. HARRISON. Correct.

The COURT. And in disposing of it, in the absence of an offer, a bid, they could buy it in?

Mr. HARRISON. Correct, may it please the Court.

The COURT. Why, then, can't they do directly what they could do more or less indirectly by a process of several different steps?

Mr. HARRISON. May it please the Court, there is quite a difference between collateral and the rights of a pledgeholder, and

the rights of one who is an absolute owner and independent of debt.

The COURT. In that as the holder of the stock, they are liable?

Mr. HARRISON. No; I think the difference would be more fundamental than that. As a matter of fact, authorities were cited in this case by the defendants upholding generally the right of public officers to receive security for the payment of obligations to the United States—cases which also held that, having
881 taken such security, naturally the officers could enforce that security.

I not only question but assert that what the Commission in fact and in legal effect here did was to take security; and when it took that security, had there been a default in the indebtedness it could have foreclosed and secured all the rights of a pledgeholder. But, necessarily, when the rights of the pledgeholder are exercised, it is upon default; the sale is because of default, and default only; and the power of sale is incident to the default; and the obligation of the pledgeholder is to dispose of the collateral at the best possible price and on the best possible terms, having due regard to the owner of the equity as well as the pledgeholder, and to apply the proceeds to the diminution or payment of the debt, and the balance, if any, to be paid to the owner of the equity.

In that respect the difference between the qualified title of the man who holds collateral and the position of the man who holds a debt, trust or mortgage upon real estate, is very little, if any—or a man who holds a defeasible title in fee as security for a debt. In every instance the right of the holder of the lien, the right of the holder of the pledge, and the right of the holder of the mortgage, is limited to default, and his right of sale is dependent upon default.

The COURT. You say there was no default at the time this transfer was made?

882 Mr. HARRISON. No, may it please the Court. At that time there was indebtedness to the Government overdue. However, funds were borrowed, with which all of the overdue payments were made. And at the time these indorsements and the contract were made, it recognized the existence of that indebtedness and the pledge of this collateral.

It wasn't—and I do not think the defendants ever will claim—that the intent was that there should be an immediate foreclosure on this pledge. And the fact is that there has never been any foreclosure on this pledge. And the fact is that there has never been any reduction whatever in this debt. The fact is that the debt has been paid in full. A pledgeholder can in no circumstances assert that defect in title whereby he may forfeit the title and

collect the moneys also. His authority is limited to foreclosure, and his authority is limited to the use of the collateral for the purpose of protecting payment of the principal obligation. It is an incident to the principal obligation, and the original owner continues to be the owner of the equity and he continues to have a right, a property right, a right to the return of that property when the debt is paid.

And when this debt was paid, in or later than September 1943, when it was paid in full, no longer could a collateral or pledgeholder claim any right in this property. Upon that I am
883 quite certain of my law, may it please the Court, and I am quite certain that one who holds a debt and takes the qualified right of a pledgeholder or collateral holder, acquires by virtue thereof no unqualified title. There remain obligations to the original holders of the property.

The COURT. I agree with everything you say in that regard. My question goes to the legality of the transaction which, as the Government says, absolutely transferred the title. And I was questioning you in this regard:

If they had the right to take it as collateral, to sell it on default, and to buy it in—and no express right is given, I take it, to do that; it is implied and implicit in the general conduct of the Commission, as a function of the Commission—why, then, as a matter of law, would they not have the same authority, implicit in the situation, to take it outright in liquidation of an indebtedness?

I am not questioning whether it was in fact done. I am talking solely about the legal question.

Mr. HARRISON. There is no question in my mind, may it please the Court, that if the Commission had no power to purchase shares of stock in this domestic, private steamship corporation, it had no power to acquire those shares, under the law, by the indirect method of reducing the indebtedness of anyone.

In other words, if I were a debtor of the Government in a given sum, and if the Maritime Commission offered to re-
884 lease me from the whole or any part of that debt, in exchange for shares of stock in a steamship corporation, it is perfectly clear to me that the Commission is purchasing that stock—and if I were the seller, as a cautious man, I would look to the authority. They would have to point out to me the authority under the law whereby they purport to take these shares; for if they had no right to the shares, I probably would have an invalid and unenforceable contract.

In other words, you cannot do by indirection what the law does not permit you to do directly. And if in fact no authority was conferred to acquire title to those shares, then it cannot be ac-

quired by reducing indebtedness in exchange for the acquisition.

The COURT. Let us take a ten-minute recess.

(A brief recess was taken.)

Mr. HARRISON. On the question of authority, may it please the Court, the position of the plaintiffs is that nowhere in the law, certainly nowhere out of the Merchant Marine Act itself—and we assert nowhere in that act—was there conferred upon these defendants the power or authority to do more than to take collateral, to take security, for indebtedness to the United States; and that never was there conferred upon them the power to acquire, either by purchase or otherwise, the title and indefeasible right to possession of shares in stock of the domestic corporation.

885 I think it is not unfair to suggest that the comment in the brief of defendants itself supports such statement of the plaintiffs, for in defendants' brief I note that they attempt to place upon two sections the authority which they assert in this case. They refer to section 207 and point out that it has two parts—first, authority to make contracts and disburse funds to carry on the activities authorized by the statute; second, to make contracts and disburse funds to protect, preserve, or improve the collateral held by the Commission to secure indebtedness.

First addressing ourselves to the earlier portion of that section, I think it is fair in the first place, by way of introduction, to say there is certainly nothing else in the Merchant Marine Act upon which the defendants could possibly place reliance. Certainly no examination of ours has disclosed anything else which could possibly furnish the basis therefor.

In the first part of section 207, it refers solely to the making of contracts and disbursements in connection with the carrying out of activities authorized under the law. And the Commission apparently, according to the memorandum of defendants, claims that in acquiring stock here independent of indebtedness or its payment, that the stock acquisition was incidental to a comprehensive program for rehabilitating, subsidizing, and main-

886 taining the essential services of a shipping company, in furtherance of the congressional policy for fostering and maintaining an adequate domestic merchant marine, in the Merchant Marine Act of 1936.

And again along the same line it is said in the same brief of defendants that the Commission was empowered to acquire title to this stock, independent of the debt or its payment, to use in the program, particularly where the transfer was part of a transaction designed to rehabilitate a shipping company and qualify it for statutory subsidies so as to enable it to perform the functions as part of our merchant marine.

It would indeed, may it please the Court, be an amazing grant of power if the Commission were empowered to make any contract it considered, or to make any disbursement that in its discretion it deemed desirable for these very broad purposes. I think it could be fairly said that at least within the field of shipping there was no limit to the authority of the Commission whatever. But when we look to the Act, we find there is no reference there to any authority of the Commission to carry out any comprehensive programs. There is nothing in the statute which refers to rehabilitating or maintaining essential services of a shipping company; and there is nothing which empowers the Commission or its members to enter into any contract to qualify a shipping company for a subsidy.

Actually, if any of this character of language is to be
887 found at all, it is found in section one; and second one of the Merchant Marine Act is a congressional declaration of policy, a declaration of policy in keeping with which in the remaining sections of the act the Congress itself proceeded to create a commission and to confer upon that commission very definite and specific duties and responsibilities which, in the judgment of the lawmaking power, were designed to further the policy it declared in section one.

Indeed, if section one, a declaration of congressional policy, enabled the Commission to do what it thought best in furtherance of that policy, there would be no need for the remainder of the act, and there would certainly be no need for section 207—because on that theory it was for the Congress to declare the policy and the Commission to do what it wished to further it.

Actually, of course, section 1, a declaration of legislative policy, is in no sense a grant of power, and the power which was conferred upon the Commission is contained in the succeeding sections. And thus we are brought back to section 207, which added in no respect to the power of the Commission. It added in the first part thereof to the activities in which the Commission might engage under the law. It was authorized to make contracts. It was authorized to make disbursements to carry on those activities. But those activities were in no sense or in no respects enlarged,
888 except in one respect; and then we come to the second part of the section, in connection with which it was authorized to make contracts and disbursements, to improve, protect, and preserve collateral held as security for indebtedness.

I must confess, may it please the Court, that I have great difficulty, that I find it impossible to read into a provision of the statute, empowering the Commission to take collateral security, or to improve and protect that security, the power to acquire property itself independent of security or indebtedness.

Obviously, had it been intended to confer such a power, the Congress would not have limited its authority, its grant of power, to property taken in connection with or as collateral. It would have empowered the Commission to purchase or acquire stock in any manner it saw fit, in a domestic, private shipping corporation. It did not do so.

It draws the distinction, the distinction which I made a short time ago, the distinction between the acquisition of property as collateral, or to protect and improve it, and the acquisition of property independent of indebtedness. For the claim of the defendants here is that they acquired that property and that they are holding it, irrespective of the payment of any debt. They are still holding it, although every cent of the debt was paid.

They are not attempting to foreclose. They are not
889 attempting to sell because of nonpayment, and apply the proceeds. They are taking the position that although the debt has long since been paid, although there is no debt to which this property can be an incident, although they have never foreclosed it either for the benefit of the Government, by sale to themselves, the Government, or to anyone else, that having secured payment of the debt, they have an unqualified right to this property, an unqualified right which reaches back to the very beginning of the transfer, and an unqualified right to retain it regardless of any debt at all.

And I submit that that is a claim, not to collateral, not to the rights of a pledgee; that is a claim to the property itself, independent of collateral, independent of debt, and independent of indebtedness.

The Court asked me shortly ago whether it was the position of the plaintiffs in this case that this transaction was prohibited by law. Mr. Hester has called my attention to the fact that I have overlooked section 905 of the Merchant Marine Act, which expressly prohibits the transfer of shares of stock in a steamship corporation, subject to the terms of the act, to a non-citizen. He has also called my attention to the fact that the definition of "citizen" in the act includes the usual—

The COURT. By implication or expressly?

Mr. HARRISON. Expressly, because by definition of the
890 persons who are citizens and by—and when I say "expressly", may it please the Court, I mean there is a definition of what a citizen is, and that it does not include the Government, and therefore the Government is excluded. I am not certain whether that comes under one category or another. However, may it please the Court, as far as I am concerned, I consider it immaterial in this case whether it is an express prohibition or a

complete lack of authority. One or the other, the defendants appear here without authority, and without authority they cannot appear before this Court and claim to be the Government, to be acting as agents of the Government, to be speaking for the Government, either in respect to a claim to the property, to the holding of it, or to the selling of it. And without that authority they stand before you as individuals, and without that authority not only have you jurisdiction, but the plaintiffs have a right to relief.

We believe that the lack of authority is clear. We believe that section 207 cannot be distorted to confer upon the defendants, as officers of the Government, the power to have done more than to have acquired this stock as security for a debt now paid. And that debt having been paid, no authority exists to continue to retain the property; and that therefore they stand before you without warrant in the law, and we stand before you with the right of recovery.

But I wish to point the Court, if I may, to a further
891 ground of jurisdiction independent of that. It is said in the defendants' brief that it is conceded by the plaintiffs that title was acquired here. If that means title independent of the debt, if that means ownership of the property, not as security, but of the property as such, we wish to clarify any such misunderstanding and to make it clear now that our understanding of that contract is nothing of the sort.

Already we have mentioned to the Court our conviction that this contract by its own terms is properly susceptible of one meaning only. It is susceptible of a meaning that the transfer of title free and clear of all liens and incumbrances—incidentally, a transfer without which the pledge would be of little or no value—was a transfer of title which under the contract and within the true intent and meaning of the parties transferred the property as collateral only; and that the terms of that contract, valid as so interpreted and construed, were fully performed, and have disappeared entirely and are not properly before the Court as any basis of defense.

And so I repeat that it is of little moment that opinions and provisions in the contract and in the indorsements of the certificates plainly show that title free and clear of all liens and incumbrances was conveyed to the Maritime Commission. There is no question in that respect. There is no question that the title which the Commission received had no lien or incumbrance upon it and that
892 it was free. But that title so conveyed was a title which under the law could be and was as security only.

The claim has been made that this property might have been acquired upon the ground that there was a release of indebted-

ness. Actually, if you will peruse the contract, you will find the plain statement that not one cent of the debt was taken off, and that the debt remained unreduced after the contract was executed, and that every cent of it with interest has been paid.

Consequently, there could have been no settlement of a debt, either in part or in whole. And, as a matter of fact, if there were a settlement of debt, then under the law it is not within the jurisdiction of the Commission but it is under the jurisdiction of the Treasury Department, under appropriate statutes cited in our brief.

There was no authority in the board to make any other contract. There being no authority in the board to make any other contract, no other contract was made. It existed with validity and vitality only until it had served its legitimate purposes under the law and the statute. And when the debt was paid, since the agents of the Government could acquire no more than the law permitted, they no longer held any interest on behalf of the Government. The law itself is a part of this contract, and all interest of the Government ended because under the law that was
893 all its agents could take when the debt was paid.

The COURT. Let me make certain I clearly understand one statement you made. You said at the time this contract was entered into, no indebtedness was released and no one was released from indebtedness?

Mr. HARRISON. Well, may it please the Court, I don't think I used the last phraseology the Court used. The contract provided only the following terms, I believe, that are material to this case:

First, that 92 percent of the voting control of the company should be transferred to the Commission, free and clear of all liens and incumbrances.

Second, that one corporation and an individual should be released from liability upon certain notes for the purchase of vessels.

Third, that not one cent—and that is not the exact terms—that no part of the debt of the corporation should be considered to be released or paid.

I say now that the full extent of the power of the Commission in taking title was to take it as collateral for that debt. I say that the transaction complied with the law only if it be treated as an exchange of the shares of stock as collateral for the liability of the corporation and the individuals as guarantors or accommodation makers of the ship purchase notes.

894 The contract read in keeping with the law, and with the law as a part of it, simply meant that there was a substitution of all of these shares of stock of various stockholders—92 percent of the voting control—in exchange for the elimination of the liabilities of those secondarily liable on a part of the in-

debtedness, but with no effect whatever upon the debt of the corporation—all of which was paid.

So construed, I say, the contract is valid, and in accordance with the law, and it has been fully performed. And I say that to construe the contract in any other manner would render it invalid to the extent it exceeded the authority. And, as a matter of fact, if it be construed in any other manner, obviously not only was the commitment of the Commission invalid, but the commitment to transfer the stock was invalid. And, as a matter of fact, in that case there was no release of anyone, because the consideration therefor being invalid, the Government would not be bound by the release.

If the Commission had not the authority to make the contract which it did, if the Government therefore did not secure the consideration which was intended, then obviously those who were secondarily liable upon the ship purchase notes were not released and they remained liable until full payment of the debt, notwithstanding the terms of the contract.

In other words, the contract can be treated as valid in its entirety only if it be construed as one within the Commis-
895 sion's power; and one within the Commission's power meant that they could take additional or different collateral; that they did so and in consideration thereof they released those secondarily liable in lieu of the collateral owners.

I say that must be the meaning of the contract, because any other result is unjust, oppressive, and results in the debtor receiving both the security and the debt.

I say that as a matter of fact a long series of subsequent transactions would become doubtful in respect to their validity—definitely questions of law would arise—if this contract be one that must be treated and enforced as a contract made in excess of the statutory power.

I say that all of those results should be avoided by this Court in interpreting this contract, and that it should give to it an equitable, a reasonable, and a proper meaning—a meaning which means that on September 1943, the contract disappeared because of full performance.

I would like, in that connection, to comment briefly upon certain statements in the brief of defendants to the effect that subsidies were dependent in some respect upon these transfers, and that subsequent action of the Commission was based upon this contract, in some respect. I merely ask the Court to read those provisions of the contract and the law, and he will find expressly provided in this contract that the Commission by virtue
896 thereof assumed no obligation with respect to operating-differential subsidies; but, on the contrary, it specifically

provided that it would merely receive applications, make findings under the law, and determine those applications within the meaning of the law. And the law itself specifies what findings must be made, and the purchase of stock in a private corporation is not one of those findings. And the Commission itself, as it well knew, and cautiously protected itself in the contract, could not have agreed to give an operating-differential subsidy in exchange for shares of stock to be transferred to the United States, and it didn't do so.

So that this entire contract reduces itself simply to this question: The debt having been preserved in its entirety, property of the stockholders having been taken in respect to title, certain individuals secondarily liable on the part of the debt having been released, we can interpret and enforce that contract validly and reasonably in one way only, and that is to treat it as a substitution of security and upon repayment of the entire indebtedness it left the defendants with the obligation to return the property—and without any protection, statutory or otherwise under the law, to retain it.

Now, finally, a suggestion is made in the case of defendants that benefits having been received and deliveries having occurred, the rights, if any, of the plaintiffs have been forfeited.

897 In the first place, I fail to see what benefits the plaintiffs have obtained. In this case the Government was avowedly seeking to collect a debt. It bases the right, if any, of the defendants in this case, upon that debt. The defendants were acting under a statute which authorized the Commission to protect and preserve the security for that debt. That debt was the debt of the corporation. That debt has been paid in full.

It was a benefit, no doubt, to all of the parties that that debt be paid and paid in full. But what benefit other than the performance of the obligation of the corporation has occurred? And what benefits have these plaintiffs received? They are divested of their stock, as the matter stands today. They have put up collateral and find themselves in the situation where the debt is paid, and they are unable to procure repossession of their own property.

The answer to it all is that, properly construed, this contract has been fully performed. There is nothing more for anyone to perform, except that the contract obligations having ended by performance, it is the duty of defendants as individuals to return the property to plaintiffs.

Now in respect to delay, there has been no delay whatever. It is the position of the plaintiffs here that the possession of defendants was rightful, as officers of the Government under a legal and valid contract, until the full payment of this debt.

898 And so long as that debt remained unpaid, the plaintiffs had no right of possession; and had they demanded it, it could have been properly refused under the terms of a contract validly made. But when that contract was performed, when the obligations were at an end and the debt paid, then and then for the first time the plaintiffs were entitled to the return of their property—and then they made demand and it was refused.

The COURT. When was the debt paid?

Mr. HARRISON. The debt was paid at some time in or after September 1943. In that respect we are depending upon the allegation in an affidavit, because we have no actual information or access to the records to know when it was paid.

The COURT. When was the demand made for the return of the stock?

Mr. HARRISON. The demand was made in July of this year. And I might say in that connection, may it please the Court, that the first information—although this is not a matter in the complaint—that the first information plaintiffs had concerning settlement of this indebtedness was upon announcements in an affidavit here, the plaintiffs never having been otherwise informed respecting the facts.

In any wise, whatever the date, may it please the Court, I think it is perfectly obvious, that even if we waited a year and a half to make demand for the return of our property, there
899 is no basis for the claim of laches, for there has been no change of position. The contract is performed. The debt is paid. The property is in the possession of the Government. The Government does not allege it has depreciated in value. On the contrary, it claims it has appreciated in value. And if it is our property, the restoration of our property to us cannot result in the performance of anything but a person obligation of the defendants, because they have unlawfully withheld the property of others, and I know of no basis there for applying any doctrine of laches or equitable estoppel.

May it please the Court, I would like briefly to conclude, unless the Court has further questions or Mr. Hester has something he wishes to comment upon, by summarizing the position of the plaintiffs in this case in this manner as we see it:

The plaintiffs rest here upon the ground that there is a cause of action ex delicto for the recovery of personal property from personal defendants. They base that claim upon a proof of ownership and upon facts which show delivery of that property into the possession of defendants under authority of law which long since terminated.

We base the jurisdiction of this Court, in the first place, upon the lack of authority of these defendants, upon their inability to

present to you any statutory power to make the claims or to take the action which they now make and take.

900 We assert that in effect defendants appear before you attempting to stay the jurisdiction and the action of this Court by the simple assertion of authority, by their own personal declaration of agency, but without statuory warrant. We say that in that case, under a line of decisions which has never been questioned and which this Court must overrule to deny jurisdiction, this Court has the power to act—and that by the very fact that that authority is lacking otherwise, the plaintiffs are entitled to relief on the merits.

In the second place, we say that irrespective of that approach to the subject of jurisdiction, that the so-called contract upon which the defendants rely does not and cannot have the meaning which they endeavor to impart to it; that that contract ceased to be, so far as obligations thereunder were concerned, in 1943, leaving the defendants with a naked and unauthorized retention and possession of plaintiffs' property; and that that contract can only properly be interpreted in that manner and legally so interpreted; and upon that ground, also, we assert defendants appear here without any lawful basis for claiming sovereign immunity from suit.

We say that these defendants propose to dispose of this property and disperse it among the public, and that if they do so, the very subject-matter of this suit will disappear from existence, and that the plaintiffs will be left, first, with no remedy against the

901 Government in the Court of Claims or otherwise, and with no remedy in respect to this property which suddenly there seems to be enormous haste to dispose of. We say that if this property is thus dispersed, there will be no remedy for the plaintiffs.

We believe that the Court not only has jurisdiction, but that on the very same basis it has power to act, that it should act favorably to the suitors' complaint on the merits.

It is our belief that there is no real dispute upon the facts. It is our belief that this raises really a question of law.

The plaintiffs are conscious of the desire for an early disposition of this cause and they join in that desire; and they suggest to counsel for the defendants that the parties agree that this hearing may be deemed a hearing upon the merits of the case, and that a final decree, instead of an interlocutory injunction, may be rendered at this time.

The COURT. Mr. Sonnett.

Mr. SONNETT. May I proceed, or does Your Honor desire to recess? I shall not take more than probably twenty minutes.

The COURT. I don't want to limit you at all, but I have such a heavy day tomorrow that I think perhaps we had better go on, if you don't mind.

Mr. SONNETT. If the Court please, my friend, counsel for the plaintiffs, has very skillfully put the cart before the horse, and with even greater skill has then made both the cart
902 and the horse disappear. I make that not facetiously at all; but having made such a thorough study of the case as counsel undoubtedly has made, it is perfectly clear that the initial inquiry which must arise in this case is the inquiry whether or not the Court has jurisdiction of the subject-matter of the suit.

It is also perfectly clear, by an unbroken line of decisions going back to the Lee case on which counsel relies too heavily, and succeeding it, that it is not necessary at all, nor appropriate in determining the issue of jurisdiction, to determine the merits of the case first. Counsel would have this Court decide whether or not there is merit in the suit, and then determine whether or not there is jurisdiction in the Court. That, I submit, is putting the cart before the horse.

As to counsel's remarks concerning the contract, in the two hours of his argument, I have yet to know whether this contract—formally made and entered into in August 1938, with the advice of counsel representing these plaintiffs, who gave his opinion that the transaction was legal and the title to the stock transferred—I am unable now to know whether that contract has disappeared entirely, in counsel's eyes, or whether he would have this Court rewrite the contract, or exactly what should be done to the contract.

But rather than engage in any such activities, I submit we
903 might better confine ourselves to what was in fact done, and intended to be done, by these parties.

The parties in 1938 were represented by very able counsel on both sides. Those parties attempted to and intended to and did everything they could do to make a valid transfer of these certificates of stock to the United States of America, as represented by the Maritime Commission. Ever since that time, up until very recently, the fact that that contract transferred complete legal title to the Maritime Commission was restated. The plaintiffs in this case restated it in their income tax returns, which were, I presume, sworn to and submitted as formal documents to the Government of the United States thereafter. And in those income tax returns they expressly noted that they had transferred all right, title, and interest to this stock to the United States of America.

The opinion of counsel at the time was that the transaction would transfer title. The question of title to the stock appears

to have arisen only after it was determined by these plaintiffs that the stock was worth something, as it is now worth some eight million dollars. And now that the stock has turned out to be worth something in excess of eight million dollars, these plaintiffs would appeal to the court of equity to have this Court say that the eight million dollars which this stock represents should be distributed, not to the taxpayers, but to these individual plaintiffs.

904 Now, the cases, if the Court please, including the Lee case upon which plaintiffs rely, have uniformly held that where property is in the possession of the United States, and where the United States has at least a colorful title to that property, any suit to try that title is against the United States.

The principle was restated I think clearly in the recent Mine Safety Appliances Company case, to which counsel referred. In that case there were allegations, as here, that the acts—indeed, in every one of these cases, I think—the allegations were made that the acts of the individual Government officers were illegal and unauthorized. Otherwise there would be no color of claim against the Government.

There, as here, it was alleged that the action sought to prevent a tort by a Government employee or officer acting as an individual, consisting of a trespass against the appellant's property, and that equitable relief was necessary.

There, as here, the action which the Secretary or the Commission proposed to take was not and is not in violation of any express command of Congress. Indeed, counsel stipulates that fact.

Further, the court there pointed out that the relief sought necessarily involved the rights of the United States and, as the court stated—

905 "Thus, though appellant denies it, the conclusion is inescapable that the suit is essentially one designed to reach money which the Government owns. Under these circumstances the Government is an indispensable party, even though the renegotiation act under which the Secretary proposed to act might be held unconstitutional."

The COURT. I suppose you would agree, would you not, that if this action by the commissioners in acquiring the title to the stock was illegal, then this is not a suit against the United States?

Mr. SONNETT. I would not so agree, if the Court please, for the reason that whether illegal or not, the transaction purported to give absolute title to the United States; that the United States is in possession of the property and has been in possession of the property for some time; and that the claim of the United States is in any event a colorable claim.

Every case cited by us, and indeed I think every case which has dealt with the question of jurisdiction as to such a matter, has not

required that the United States establish as a matter of merit that it has legal title to the property; for if that were necessary, there would be no point in the jurisdictional question at all. Indeed, the cases have all clearly pointed out—before, since, and up to now, with respect to the Lee case—that all that is necessary on the part of the United States is at least a colorable claim.

906 And that colorable claim, and possession of the United States, is enough to defeat, on jurisdictional grounds, a suit such as this.

The Lee case, upon which counsel relies so heavily, was a case where the majority opinion, it being a five-to-four case, quite properly held that the private property of citizens could not be confiscated and that in a suit where private property had been confiscated—as the court said, in its majority opinion—perforce a remedy would lie against the United States. With that the Government has no quarrel.

In the Lee case, the taxes which were due and owing, and by reason of which the Government acquired its tax liens, were taxes which the plaintiff had sought to pay, and in that case the plaintiff having sought to pay through an agent those taxes, the Government officials said they would not accept that payment; that they would require the payment be made in person by the plaintiff.

The court quite properly held that that was an unreasonable attitude and that the plaintiff could properly recover, having tendered payment.

Were this case a case where the contract had been done, as had been proposed back in the early negotiations, to transfer the stock as collateral, and that the Commission would hold it until payment of the debt, and had the debt been paid and the Commission then refused to turn over the stock, we would

907 have a very different case and it may well have been a case in which there would be a remedy at the Court of Claims. But that is not the case here. This case can be made to resemble the Lee case only if other facts are supplied to this case. First, that this were a contract whereby the stock was pledged solely as collateral. Second, that the plaintiffs here came and tendered through an agent—through counsel, perhaps—payment of the debt secured by that collateral; that the Commission said, "No, we will not accept payment through an agent; we must have that payment from the plaintiffs in person." Had the plaintiffs then sued, I would say clearly under the Lee case this Court would have jurisdiction and the Government would have no appropriate defense, as it did not in the Lee case.

It should be noted, further, that even under the facts of the Lee case, if the Court please, the four dissenting justices, despite the taking which was in effect a forcible taking of the plaintiff's

property, the four dissenting justices in that case held it was a suit against the United States and that it wasn't properly maintainable in the courts.

I do not propose, if the Court please, to argue at length the question of whether or not the complaint states a cause of action other than the jurisdictional point.

The COURT. Let me ask you this, Mr. Sonnett: You contend, as I understand your position from your argument
908 before and from your motion, that this was a sale of stock, the consideration for which was release of debt?

Mr. SONNETT. It was an incidental acquisition of title to the stock shares pursuant to a plan for reorganization of a shipping company, which reorganization was essential if the Commission were to carry out its functions.

I submit, if the Court please, further on that question, that if the Court questioned counsel—the answer I don't know yet—if the Commission would have had the power to acquire title to this stock through the foreclosure on a collateral agreement, and then to acquire the title to the stock itself, later, what would the Commission do with the stock so acquired. The stock, in that case, I presume, under the plaintiffs' theory, would have to be given back to the defaulting debtors.

The COURT. I think, Mr. Sonnett, I don't require further argument from you. I have given this case a lot of thought, and I am ready to decide it now. I appreciated Mr. Harrison's argument very much. It does not, however, change the view that I have reached in my study of it. And I may be wrong, but I think two things. One is that this transaction was legal, in the sense that the Commission had the legal right; and therefore I think it is inescapable that this is a suit against the United States and therefore that the complaint must be dismissed and the injunction dissolved.

909 Now, perhaps I shouldn't volunteer this. I haven't the slightest doubt that this case will, and I think it should, go to the Court of Appeals. And I don't think it is reasonable for me to dissolve the injunction, if it does go there. I feel rather certain that the Court of Appeals would entertain favorably an application to advance if there. I don't know that they would, but I assume they would. I think, therefore, that I should continue this restraining order if you—let me ask you; do you intend to appeal this case to the Court of Appeals?

Mr. HARRISON. Yes, Your Honor; with all deference and respect, and intend to apply for a restraining order pending appeal.

The COURT. I assumed you would, and I have given thought to that in anticipation of the fact that you would. What puzzles me

and troubles me at once in that respect is at what amount I should fix the bond, and I would like to hear from you gentlemen on that. But before we get to that, it may be Mr. Sonnett disagrees with me on the question whether I should do it at all.

Mr. SONNETT. I wholly agree with Your Honor's view that if this case is going on appeal and an immediate application is made to the Circuit Court for a stay pending determination, the Government should take no action looking toward disposition of this stock.

910 On the other hand, the stock is now the subject of several bids. The first and third of those bids provide by their terms that they expire on December 31 of this year. I am told the stock of this company, which is traded in on the exchange, has dropped several points within the past several months.

There is a grave question in the mind of the Chairman of the Commission whether or not bids as good as the present bids will be received after the first of the year, bearing in mind that the provisions of the bids are not limited solely to a purchase of the stock by the purchaser, but entail certain other obligations with respect to operation. The Chairman of the Commission, in his informed judgment, if the Court please, is most anxious for a prompt disposition of the matter.

The COURT. I think there should be.

Mr. SONNETT. Should it be possible for an application to be made to the Circuit Court within 24 hours for a stay pending appeal, I would be very glad to participate in the presentation of that to the Court. Should a stay pending appeal be issued, of course, the question of security would have to be resolved by the Court. If Your Honor determines to issue a stay longer than a stay of 24 hours, I should like to be heard upon the question of the amount of security which Your Honor should direct.

Mr. HARRISON. If Your Honor please, I can dispose of
911 counsel's question, if I may, by now formally applying to this Court for a stay pending appeal, which is in the power of this Court to give and which we believe this Court in the exercise of its sound discretion should give now. I am willing to be heard now on the subject of a bond.

The COURT. Do you intend promptly to note and proceed with an appeal?

Mr. HARRISON. We intend to immediately. We are just as anxious to dispose of this matter.

The COURT. What do you mean by "immediately," Mr. Harrison?

Mr. HARRISON. Well, as quickly as Mr. Hester can get the documents prepared for presenting there.

The COURT. My mind is not working in terms of having you run across the street now.

Mr. HARRISON. We will within a very few days attempt to perfect the appeal.

The COURT. I wonder, gentlemen, if you could get together on the bond, at least make an attempt to get together on the amount of the bond.

Mr. SONNETT. Nothing would please me more, if the Court please. But I think it would be demonstrated to be future. In the judgment of the Chairman of the Commission, I think I should ask for security in the amount of $8,000,000. If these bids go through before December 31, 1945, the Government is pro-
912 tected. If they do not, I would not want to be responsible for the results, and I am certain he wouldn't.

The Court. Mr. Harrison,

The COURT. Mr. Harrison, in that regard, this stock pending the appeal is either going to go up or go down. There is some possibility, also, it will remain at its present value. But the probabilities are, I suppose, it would either go up or go down. This bond should protect the Government, which claims to own it, against the eventuality that it may go down. Have you any ideas as to what is a reasonable protection?

Mr. HARRISON. I might say this, may it please the Court. I do not understand that the issue in this case, involving as it does the title to personal property, can properly place the plaintiffs in the position of speculating on the future value of this stock.

The COURT. But haven't I got to speculate on it?

Mr. HARRISON. I think not, Your Honor, if I may be heard on that. The subject-matter of this suit is the shares of stock. I believe Your Honor, in view of his restraining order to date, and in view of his comments today, indicates this is by no means a frivolous suit.

The COURT. I don't think for a moment that it is.

Mr. HARRISON. That being the case, may it please the Court, the only effect of disposing of this property at once and dis-
913 persing it is to deprive this Court of the subject-matter now under its jurisdiction. The status quo is preserved by retention of these shares.

The indications we have received from the Commission to date are that this stock has never depreciated but has appreciated in market value. We know of no sudden reason why this property must be sold in a few days. And the public press carries reports the bidders for this stock are not only prepared to extend the same but increase their bids at this time.

The COURT. Do you have that in your hand?

Mr. HARRISON. Yes, sir [handing up clipping]. This is the Pacific Shipper, a publication of the shipping industry on the West Coast, may it please the Court.

The COURT. Have you anything to say about that, Mr. Sonnett? Do you know anything about it?

Mr. SONNETT. I do not, sir; and I have only this to say, that no matter what is in the public press, I must necessarily rely on what I am told by the Chairman of the Maritime Commission.

Mr. HARRISON. May I say it is not so much the question of amount, which I have not yet suggested to Your Honor, that is my concern at the moment; but it is my concern that Your Honor has suggested what would be a form of bond which would have to guarantee the price the Commission might get for the subject-matter in its own control, in the future.

The COURT. I don't know that I follow you there. Let
914 me put it in a different way. If you lose this suit, the bond should protect the Government against any loss that it may have suffered by virtue of your bringing the suit. Isn't that correct?

Mr. HARRISON. I think not, Your Honor. I think this property, which is the subject of controversy, we are entitled to have preserved in status quo until the determination of the suit.

The COURT. Yes.

Mr. HARRISON. This property is within the sole and exclusive control of the Maritime Commission. Through this stock it exclusively controls the corporation and its business activities.

The COURT. Now it wants to sell the stock; and through me, at your request, or by virtue of my action at your request, it can't do it.

Mr. HARRISON. That is correct, sir.

The COURT. If it should develop that the higher courts hold I am right and you are wrong, it can be that in the meanwhile the delay will have caused loss, in that the stock will have less value than it has now. Isn't it against that eventuality——

Mr. HARRISON (interposing). No.

The COURT. A bond on the restraining order is designed to protect?

915 Mr. HARRISON. I think not, Your Honor. I think the decisions would hold otherwise, and we would like to submit them. And I would like to point out, what would happen to the profit if it appreciated? Are we entitled to the profit? If we are to guarantee against loss, then the transaction is one for our profit, and we are entitled to earn a profit or a loss, as the case may be.

The COURT. No, no.

Mr. HARRISON. Then may I say, with all respect, that when we appear before this Court, with probable cause for pursuing our property in the hands of the Commission, to say we must in effect make a market guarantee, based upon alleged offers existing at the present time, is to compel us to speculate in this litigation.

The COURT. Exactly. There is no doubt that that. That is always true in the case of a bond on injunction. You have to speculate, haven't you?

Mr. HARRISON. No, I think not. I know of no bond on injunction——

The COURT (interposing). What value is the bond, then? What value to the Government would a bond have if it weren't based on some estimate of possible loss?

Mr. HARRISON. But not of market loss, may it please the Court.

The COURT. How else would you arrive at it?

916 Mr. HARRISON. All of the costs of the Government in connection with the suit.

The COURT. You mean it shouldn't go beyond the costs of the suit?

Mr. HARRISON. I think that is correct, Your Honor. I can't conceive of any other possible damage that could occur, other than costs.

The COURT. They say today, "This is my property. I want to sell it. I can get $8,000,000 for it." You won't let them sell it, and they say, speaking to me, "At the request of Mr. Harrison, you won't let me sell it."

And I say, "That is correct." A year from now, or six months from now, the Court of Appeals and the Supreme Court of the United States each has said, "Mr. Harrison, you were wrong, and the Judge was right."

The Maritime Commission then is permitted by this Court to sell the stock. But the stock isn't worth $8,000,000 any more; it is worth seven, six, or five million, or whatever it is. Isn't that the loss?

Mr. HARRISON. I think not, Your Honor. In the meantime the respondents in this proceeding have had the possession, enjoyment, and use of the property throughout. They have not been deprived of whatever gain may be secured from holding it throughout. Obviously, if we are to guarantee the market price

of today, then we are entitled to be placed in the
917 position of owner, and not the respondents in this case.

All that you are requested to do here is to say that this property, the title to which is in dispute, shall be held without impairing the cause of action of the plaintiffs pending a final determination of the suit. And I submit, under the authorities, it is not the obligation of the suitor, who has presented probably

cause for this suit, to be compelled to guarantee an alleged market as of a given day.

The COURT. I don't know that it goes that far. But I would be very much surprised to learn that the law is as you say.

Mr. HARRISON. May we have an opportunity to present authorities to Your Honor?

The COURT. Yes, you may; but you will have to do it reasonably promptly.

Mr. HARRISON. Yes; we will do it at once.

Mr. SONNETT. If the Court please, may I say just one further thing I have not yet said, with respect to the danger to the Government of the diminution of the value of this stock? I am told it is in the interest of the Government of the United States as quickly as possible to develop and to expand our trade routes into the Pacific, in the wake of the conquest of the Japanese. I am told that is the policy with which the Government is very much concerned. I am told the disposition of this stock
918 now to operators who would be competent to operate the ships and expand those routes would be in the national interest.

To tie up this stock for six months or a year, even with security in the amount of eight million dollars, or whatever the exact amount of the high bid is, will not secure the United States in any way against injury to its national interest arising from whatever delay occurs in the expansion of these routes. But all I can do is report to Your Honor the views of the Chairman of the Maritime Commission.

Mr. HARRISON. I would like to say in response to that, may it please the Court, that the Maritime Commission has carried on these functions for seven years; that the Maritime Commission has made no public declaration nor, so far as I know, any declaration to any shipping company that it is prepared to proceed with any plan of private operation of the ships, and I think the public is entitled to the information as well as the Court, if there is any such plan afoot.

The COURT. Well, perhaps I should continue it as it is and let the Court of Appeals decide what the bond is to be.

Mr. HARRISON. We would like to submit that to the Court with our authorities, as we will do tomorrow.

The COURT. Very well. As to the matter of a bond, I haven't the slightest idea at this moment as to what it ought to be. All right, gentlemen.

Mr. SONNETT. And in the meantime, I understand the sus-
919 pension is continued under the same conditions?

The COURT. Yes.

Mr. SONNETT. Until what time tomorrow, Your Honor?

The COURT. I don't know just what time. I shall probably have to be in court all day tomorrow.

Mr. SONNETT. I think we ought to be able to fix a time, if the Court please, because we don't think we should wait further at counsel's convenience. Moreover, I would like to go away tomorrow afternoon, and I would like to get this disposed of, if it is possible, tomorrow.

Mr. HARRISON. We want to cooperate and get it done at once, but there are a mass of things to be done if this is to be disposed of by two o'clock tomorrow.

The COURT. It won't be disposed of by two o'clock tomorrow, but we certainly ought to be able to agree upon a form of order and the amount of bond by two o'clock tomorrow, or some time during tomorrow afternoon. I don't see any reason for further delay on that. I don't think that is a serious problem, except as to what the amount should be.

Mr. HARRISON. Yes, Your Honor. We will be prepared to take it up within that time.

Mr. SONNETT. Could we have a time, if the Court please? I hate to press this, but I would like to know what time we can get together on it.

The COURT. I will have a hundred people in here
920 tomorrow morning, and if we are going to have to take further time to discuss it, I don't think they ought to sit around and wait. I would rather not have it tomorrow morning at all. I would rather make it in the afternoon. Perhaps two o'clock would suit me very well. Is that agreeable?

Mr. SONNETT. That is entirely agreeable.

Mr. HARRISON. Yes, that is agreeable.

The COURT. Very well.

(Whereupon, at 4:55 p. m., an adjournment was taken until 2 o'clock the following afternoon, Friday, December 21, 1945.)

REPORTER'S CERTIFICATE

The foregoing record is certified by the undersigned court reporter for the District Court of the United States for the District of Columbia to be a true copy of the official transcript of proceedings taken by him.

THOMAS O'NEAL.

I hereby certify this is a true copy of the original on file in the District Court.

JOHN F. SONNETT, *Asst. Atty. Gen.*

923 In the District Court of the United States for the District of Columbia

Civil Action File No. 31468

R. STANLEY DOLLAR, ET AL., PLAINTIFFS

v.

EMORY S. LAND, ET AL., DEFENDANTS

Appellants Designation of Contents of Record on Appeal Pursuant to Rule 75

Filed Jan. 7, 1946

Appellants R. Stanley Dollar, Dollar Steamship Line—a California corporation, J. Harold Dollar Estates Co.—a California corporation, and H. M. Lorber—an individual, hereby designate the following portions of the record and proceedings to be contained in the record on appeal in this action.

1. Complaint.
2. Order, judgment and decree corrected pursuant to Rule 60-A of the Rules of Civil Procedure, entered herein as of December 21, 1945.
3. Notice of appeal filed herein on December 26, 1945.
4. Appeal bond.
5. Statement of points on which appellants intend to rely on the appeal, filed herewith.
6. This designation.

Clinton M. Hester,
CLINTON M. HESTER,
432 Shoreham Building, Washington, D. C.,
Attorney for Appellants.

Dated January 7, 1946.

924 In the District Court of the United States for the District of Columbia

Civil Actiton No. 81,468

R. STANLEY DOLLAR, ET AL., PLAINTIFFS

vs.

EMORY S. LAND, ET AL., DEFENDANTS

Appellees' Counter-Designation of Contents of Record on Appeal Pursuant to Rule 75 of the Federal Rules of Civil Procedure

Filed Jan. 12, 1946

Appellees hereby designate the following portions of the record and proceedings, in addition to those designated by appellants, to be contained in the record on appeal in this action:

1. The affidavit of Emory S. Land (consisting of 13 pages), sworn to on November 13, 1945 together with the Exhibits annexed thereto.
2. The affidavit of Emory S. Land (consisting of 1 page), sworn to on November 13, 1945.
3. The affidavit of A. J. Williams, sworn to on November 14, 1945.
4. The affidavit of John F. Sonnett, sworn to on November 26, 1945 together with the Exhibits annexed thereto.
5. The order granting injunction pending appeal, dated December 26, 1945.
6. The transcript of hearing held on November 15, 1945.
7. The transcript of hearing held on December 20, 1945.

925 8. The transcript of hearing held on December 21, 1945 [already on file in Court of Appeals.]

9. This counter-designation.

John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General.

EDWARD M. CURRAN,
United States Attorney,
Attorneys for appellees.

Dated January 12, 1946.
Copy received Jan. 12, 1946.

CLINTON M. HESTER,
By M. M. KEARNEY.

926

District Court of the United States
For the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered 1 to 36, both inclusive, 693 to 769, both inclusive, and 921 to 925, both inclusive, to be a true and correct transcript of the record according to designations of record by counsel filed and made a part of this transcript, and in accordance with Rule 75 (g) of the Federal Rules Civil Procedure for the District Courts of the United States, in action entitled R. Stanley Dollar (an individual), et al., Plaintiffs vs. Emory S. Land (Chairman, United States Maritime Commission), et al., Defendants, Civil Action No. 31468, as the same remains upon the files and of record in said Court, except the following:

The original Exhibits A-1 and A-2, pages numbered 37 to 692, both inclusive, are included herein pursuant to order of this Court filed January 14, 1946.

The transcript of proceedings, pages numbered 770 to 920, both inclusive, as to the accuracy of which counsel has certified, is included herein.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 29th day of January, 1946.

[SEAL]

CHARLES E. STEWART,
Clerk.

By HARRY M. HULL,
Deputy Clerk.

928 In United States Court of Appeals
For the District of Columbia

Before Honorable BENNETT CHAMP CLARK, WILBUR K. MILLER, and E. BARRETT PRETTYMAN, Associate Justices

No. 9168—January Term, 1946

R. STANLEY DOLLAR, AN INDIVIDUAL, ET AL., APPELLANTS

vs.

EMORY S. LAND, CHAIRMAN, UNITED STATES MARITIME COMMISSION, ET AL., APPELLEES

Minute entry of argument

Jan. 19, 1946

On motion of Mr. C. M. Hester, Mr. Gregory A. Harrison of the Bar of the Supreme Court of California was permitted to argue for appellants pro hac vice by special leave of Court.

On motion of Mr. Harry I. Rand, Mr. John F. Sonnett of the Bar of the Court of Appeals of New York was permitted argue for appellees pro hac vice by special leave of Court.

Argument commenced by Mr. Gregory A. Harrison, attorney for appellants, continued by Mr. John F. Sonnett, attorney for appellees, and concluded by Mr. Gregory A. Harrison. Appellants allowed to file supplemental brief and authorities.

929 United States Court of Appeals, District of Columbia

No. 9168

R. STANLEY DOLLAR, AN INDIVIDUAL, ET AL., APPELLANTS

v.

EMORY S. LAND, CHAIRMAN, UNITED STATES MARITIME COMMISSION, ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Argued January 19, 1946.—Decided March 18, 1946

Mr. Gregory A. Harrison of the Bar of the Supreme Court of California, pro hac vice, by special leave of Court, with whom Mr. Clinton M. Hester was on the brief, for appellants.

Assistant Attorney General Sonnett of the Bar of the Court of Appeals of New York, pro hac vice, by special leave of Court, with

whom Messrs. Edward M. Curran, United States Attorney, Paul D. Page, Jr., Solicitor, United States Maritime Commission, and Ellis Lyons and Harry I. Rand, Attorneys, Department of Justice, were on the brief, for appellees.

Before CLARK, WILBUR K. MILLER and PRETTYMAN, JJ.

Opinion

Filed March 18, 1946

CLARK, J.: This action originated with a complaint filed by the present appellants in the District Court on November 6, 1945. The complaint prayed for relief by way of injunction and mandamus against the defendants, members of the United States Martime Commission, as individuals. It was alleged that the defendants were about to sell certain stock held by them in derogation of the plaintiffs' asserted legal right to the securities.

Upon the filing of the complaint a temporary restraining order was granted against the defendants. The plaintiffs moved for a preliminary injunction, pending suit, and it was in response to this motion that the defendants, appellees here, came forward, submitting brief, affidavits and arguments embracing these defenses: (1) that the suit was in fact one against the United States without its consent, and therefore, the court was precluded from entertaining it; (2) that the complaint failed to state a cause of action because under a contractual agreement entered into in 1938 the stock in question was unconditionally and absolutely 930 transferred to the United States. Further, it was asserted that the plaintiffs because of their conduct, both at the time of contracting and subsequently, are not now free to challenge the validity of the contract.

Defendants, however, did not answer or move for a dismissal or summary judgment. The proceedings below went only to the motion for a preliminary injunction. After twice hearing the parties the District Court dismissed the complaint on its own motion and denied the temporary injunction. It appears from the briefs filed in this court that the parties, during the course of their argument on the plaintiffs' motion for a preliminary injunction, may have placed before the lower court most, if not all, of the substantive elements necessary to a decision on the merits. However, with only the aid of the record now before this court we are not free to review the case on the merits.

The controlling fact at this stage of the litigation is that the complaint was dismissed below. Some assistance in determining

the basis for the dismissal is found in the order itself and in this portion of the transcript from the lower court:

"I have given this case a lot of thought, and I am ready to decide it now. I appreciate Mr. Harrison's argument very much. It does not, however, change the view that I have reached in my study of it. And I may be wrong, but I think two things. One is that this transaction was legal, in the sense that the Commission had the legal right; and therefore I think it is inescapable that this is a suit against the United States and therefore that the complaint must be dismissed and the injunction dissolved."[1]

The order of dismissal indicates that the court had considered all of the offerings on both sides, and the transcript of record bears out the appellees' contention that appellants, plaintiffs below, regarded the proceeding as pointing toward a final determination on the merits. Counsel for the plaintiffs said:

"It is our belief that there is no real dispute upon the facts. It is our belief that this raises really a question of law.

"The plaintiffs are conscious of the desire for an early disposition of this cause and they join in that desire; and they suggest to counsel for the defendants that the parties agree that this hearing may be deemed a hearing upon the merits of the case, and that a final decree, instead of an interlocutory injunction, may be rendered at this time."[2]

Nevertheless, regardless of the light in which the parties, and perhaps the lower court, may have viewed this litigation, we are unable to say that the record on this appeal gives us license to review the complex and important substantive issues involved. We are constrained by the nature of the District Court order. The ground for the dismissal was jurisdictional, that is, the suit was deemed to be one against the United States without its consent and therefore not maintainable.

The complaint having been dismissed on the court's motion, the question for our decision is whether the allegations
931 found therein, when taken as true, constitute ground for relief under any set of facts that could be proved to support the claims. This question must be answered not only by looking to the complaint itself, but also by reviewing the doctrine of sovereign immunity which appears to have controlled the decision below.

Turning to the complaint, we find these illustrative allegations:

"23. That accordingly acting under the intimidation and threat of bankruptcy and the inability to meet its obligations, including obligations to the United States itself, the company was involun-

[1] Transcript of record, p. 137.
[2] Id., p. 130.

tarily forced to and did enter into said contract of August 15, 1938, a full, true and correct copy of which is annexed hereto * * *

"29. That, although such transfer was in fact and in legal effect collateral security for the indebtedness of the company to the United States Maritime Commission, nevertheless after the satisfaction of all of said debts and obligations to the United States, the defendants have asserted and claimed, and do now assert and claim that the United States is the lawful owners of the shares of stock so transferred by the plaintiffs to the United States Maritime Commission.

"30. That, the indebtedness of the company to the United States for which said shares were transferred as collateral security, amounted to approximately $7,500,000 in principal amount, all of said amount having been fully satisfied and accordingly the indebtedness for which the stock has been transferred as collateral no longer exists.

"31. That, the contract between the plaintiffs and the United States Maritime Commission was unauthorized and prohibited by express provisions of the Merchant Marine Act of 1936, as amended.

"32. That, said contracts therefore are unenforceable, that no legal rights of either party could be effected under said contracts, that said contracts are void for all purposes and effects, and that the United States Maritime Commission could not acquire legal title to the plaintiffs' stock pursuant to the terms of the illegal agreements."

Considering these allegations for the moment without regard to the question of sovereign immunity, we think they state a "claim" which, if proved, entitled the plaintiffs to relief. Whether the motion to dismiss be initiated by the defendant or by the court, it can stand "only where it is clear and apparent to the court that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the specific claim."[3]

Viewing the complaint in the light of the argument before this court and the exhibits attached to the briefs presented here, the fundamental issue is drawn into sharp focus. Appellants contend that the 1938 contract represented nothing more than a pledge of the stock. This position is founded on two arguments: (1) the Commission was without authority to acquire absolute and unqualified title to the securities, and (2) the terms of the contract, and the circumstances under which it was entered into, require the court to interpret it as a security transaction. The
932 debt originally owing the Commission has now been paid. Hence, if appellants' contention be correct the

[3] Takir Erk v. Glenn L. Martin Co., 116 F. 2d 865, 870.

United States now has no interest in the collateral. As appellants argue, the terms of the contract seem in some respects to be more consonant with the theory of pledge than that of outright transfer. For example, it was specifically provided that appellees should acquire some 90% of the voting control of the company and have the power to sell the securities acquired. Neither of these conditions would appear necessary if the transfer was intended to be absolute. Further, some of the language used in the Commission's press release of July 6, 1943, tends to illustrate the genuineness of the "claim" which appellants are asserting. In announcing that it was considering the "possibility of bringing about private ownership of the American President Lines" the Commission's release said: "Some of the debts of the Company were covered by debentures and preferred stock, and the Maritime Commission, *to protect its interests* and insure continuation of service, *came into possession* of 80 per cent of the common stock. Although the Commission had full voting control, it caused the Company to be operated by a Board of Directors which included representative local interests of San Francisco and former creditors of the concern." [Italics added.] It would thus appear that perhaps the "possession" acquired by the Commission to protect its "interests" was, as appellants urge, nothing more than a bargain by which there was a substitution of collateral resulting in strengthening the Commission's position by reason of the management control inextricably bound to the transferred stock. We have no finding or conclusion from the trial court on this basic issue which we believe must be tried.

The appellees point out that the complaint is inconsistent on its face, that is, the plaintiffs argue first that the contract is without authority in law and therefore void, and second that it is a valid contract and as such can only represent a pledge of the securities in question. It is true that in the final analysis these claims cannot stand together. In terms of any ultimate relief they occupy an "either or" relationship to each other, but at this point they are only alternative claims.[4] The tests of clarity and simplicity have been met.[5]

Of the many legal problems attendant upon the relationship of government to the citizenry probably none have been more perplexing or stubbornly resistant to precise solution than those arising under the doctrine of sovereign immunity. We will not here attempt an exhaustive review of the authorities, many of which were ably argued before us in the present litigation. They illus-

[4] Rule 8 (e) (2), F. R. C. P., 28 U. S. C. A. foll. § 723 (c).
[5] See Cohen v. Randall, 137 F. 2d 441. Cf. Catanzaritti et al. v. Blanco, 25 F. Supp. 457.

trate the great difficulty that courts have had in applying the oft-stated principle of immunity and point up the absence
933 of any controlling formula.[3] For purposes of our decision we think it sufficient to set down: (1) an analysis of the doctrine as a preliminary or "jurisdictional" problem, and (2) an indication of the long standing policy in applying the principle to situations where the governmental undertaking is commercial and corporate in character.

As to point (1) we are adopting the jurisdictional analysis made by Justice Stephens of this Court in his opinion (dissenting in part, concurring in part) in Franklin Tp. in Somerset County, N. J. v. Tugwell, 85 F. (2d) 208, 229. Citing several cases[4] relied upon by the parties in the present litigation, he points out:

"Where a plaintiff asserts that an officer of the Government is acting without power and that therefore his acts are invalid, the court in determining the preliminary jurisdictional question whether the United States is a necessary party (whether necessary parties are before a court is, of course, jurisdictional), is confronted with a peculiar procedural problem, or impasse, arising out of the fact that the determination of this question involves passing upon the very question involved in the merits. * * * Since a court must determine at the outset its jurisdiction to proceed, it is compelled to make a preliminary decision for jurisdictional purposes on the ultimate question in the suit, and this notwithstanding the fact that when the merits are heard, it may be compelled to reach an opposite conclusion. The courts solve this problem by accepting at their face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officers—unless such assertions are 'so unsubstantial and frivolous as to afford no basis for jurisdiction * * *'." Citing *Northern*

[3] The line of cases relied upon by appellants stems from United States v. Lee 106 U. S. 196, where the federal officers were denied immunity from suit. It is true, as the appellees have urged before this court, that in the Lee case the government officers came into possession of the property in question by "force and violence," that the case was an action in ejectment and materially stronger on the question of authority in the officers to do what they did. These distinctions, however, are matters of degree. If it should be found upon the trial of the present case that the defendants acted without authority in the first instance, or have by subsequent conduct overreached their statutory authority, their position becomes the same as that of the officials in the Lee case. (See also: Lane v. Watts, 234 U. S. 525, 540, and Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620.) The appellees contend that it is really the interest of the United States that the appellants seek to attack, but we think that as a prerequisite to a showing that the interest of the United States had been invaded, the government's interest must first be established. The physical fact of holding property, if bottomed on nothing more substantial than an act by an officer which may, upon trial, be found to be ultra vires, does not make out a prima facie case of government ownership, or right to claim the property. We may concede that the Maritime Commission functions only as an agency of the United States, but "the government does not become a conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." Keifer v. Reconstruction Finance Corporation, 306 U. S. 381.

[4] Payne v. Central Pac. Ry. Co., 255 U. S. 228; Northern Pac. Ry. Co. v. North Dakota, 250 U. S. 135; Wells v. Roper, 246 U. S. 335; Lane v. Watts, 234 U. S. 525; United States v. Lee, 106 U. S. 196; Transcontinental & Western Air v. Farley, 71 F. 2d 288, certiorari denied, 293 U. S. 603.

Pac. Ry. Co. v. *North Dakota*, 230 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897.

In Correa v. Barbour, 71 F. (2d) 9, 12, the court, faced with this question of jurisdiction, discusses and quotes from United States v. Lee, 106 U. S. 196, and then points out that while the "defendant claims that he has the right and authority * * * this is an immaterial allegation and in any event is not an assertion that he has such right and authority. *If he has such right and authority, that is a matter of defense for him to plead in the action, which as yet, he has not done.* [Italics added.] The danger that citizens 934 may be deprived of a hearing on their rights through the mere "claim" of authority on the part of a governmental officer who may have tortiously invaded private rights, seems to us to outweigh the possibility that the sovereign's immunity will be placed in jeopardy through the court's accepting jurisdiction of a cause of this sort.

While it does not alter the basic problem under consideration we observe another facet of the jurisdictional question which buttresses our conclusion to reject the defendant's claim of immunity at this time. The statute upon which the defendants rely as the fountain head of their authority for entering into the contract that is now challenged reads in part as follows:[8]

"The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, *in the same manner that a private corporation may contract* within the scope of the authority conferred by its charter." [Italics added.]

We are in agreement with the view taken of this section of the law by the court deciding Standard Oil Co. of California v. United States, 59 F. Supp. 100, involving the Maritime Commission. There the provision was treated in the same fashion as those statutes creating corporate instrumentalities for the conduct of public business. While the corporate acts characteristically carry language to the effect that the corporation may "sue and be sued,"[9] we think the comparison is well drawn. It is in harmony with the views of administrative officials having occasion to consider that section of the law involved in this litigation. For example, though not deciding the extent of contractual freedom conferred upon the Maritime Commission by Section 207 the Attorney Gen-

[8] Act of June 29, 1936, c. 858, Title II, § 207, 49 Stat. 1988; amended June 23, 1938, c. 600, § 2, 52 Stat. 954; 46 U. S. C. A., § 1117.

[9] See legislation creating Federal Home Loan Bank, 47 Stat. 725, 735; Tennessee Valley Authority, 48 Stat. 58, 60; Home Owners' Loan Corporation, 48 Stat. 128, 129; Federal Deposit Insurance Corporation, 48 Stat. 162, 172.

eral has stated "that section 207 was intended to confer 'all general and implied powers of a business corporation' (H. Rept. No. 2168, 75th Cong., 3rd Sess.) and that it has been construed to authorize departures from the usual rules governing the making of Government contracts when the unusual or business character of the activities involved so require (Comptroller General's Decisions, A-51647, March, 1941, and B-15611, January 12, 1942)."[10]

Thus, the Maritime Commission seems to stand in much the same relationship to those with whom it contracts under section 207 as do the more formal corporate organizations charged with transacting the government's business. Do the benefits of freedom of action which the Commission enjoys under this section carry with them commensurate burdens of liability as in the case of an agency with formal corporate status?

Courts have long recognized the difference between the more customary governmental activities and those carried on by
935 the government through the commercial device of a corporate organization.[11] Immunity from suit is of course given up when the language of the organic statute specifically waives it. The waiver of immunity is no less effective where the corporation is created by the Congress through an authorization to the President. Sloan Shipyards v. U. S. Fleet Corporation, 258 U. S. 549. Further, even in the absence of explicit statutory authority a government corporation was brought into court as early as 1898. Smithsonian Institute v. Meech, 169 U. S. 398.

Whether governmental immunity automatically attaches to a government corporation was considered in Keifer v. R. F. C., 306 U. S. 381, 389, where the Court said:

"For more than a hundred years corporations have been used as agencies for doing work of the government. Congress may create them 'as appropriate means of executing the powers of government. * * *' *But this would not confer on such corporations legal immunity even if the conventional to sue-and-be-sued clause were omitted.* * * * Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so?" [Italics added.]

Recent cases express a clear policy toward restricting the use of the immunity shield. In Brady v. Roosevelt S. S. Co., 317 U. S. 575, the Court quotes with approval from the Sloan Shipyards

[10] 40 Op. A. G. No. 68, March 23, 1943.

[11] In Bank of the United States v. Planters' Bank of Georgia, 9 Wheat. 904, it was said: "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself and takes the character which belongs to its associates and to the business which is to be tranacted."

case, supra, on the matter of the liability of a government corporation, officer and then says, "* * * when it comes to the utilization of corporate facilities * * * in the broadening phases of federal activities in the commercial or business field, immunity from suit is not favored." (Citing: Keifer v. Reconstruction Finance Corp., 306 U. S. 381; Federal Housing Administration v. Burr, 309 U. S. 242.) We think it a logical and necessary continuance of this policy to apply it to the present case, where the language of the statute, as well as the strongly asserted interpretation placed on it by the Commission, authorize contracts "as a private corporation."

Counsel for appellees has asked us to consider as a part of the record on this appeal certain affidavits which were submitted to the lower court during the argument on appellant's motion for a preliminary injunction. We do not believe that the present posture of this case is such as to warrant our accepting these affidavits. To do so would be to infringe upon the lower court's prerogative to decide the case on the merits. As we said in Farrall v. D. C. Amateur Athletic Union, No. 9084, decided February 25, 1946:

"There is a great difference between discovering whether there be an issue of fact and deciding such an issue. The affidavit can be used for the former purpose but not for the latter. Thus, if a fact be averred in the complaint and contradicted in the affidavit, the latter version cannot be accepted by the court for the purposes of a motion to dismiss."

In our opinion, the affidavits, as well as much of the argument before this court, raise controversial questions of law and fact proper for presentation to a trial court.[12]

We should like to make it quite clear that in reversing and remanding this case for further proceedings in the court below we are not holding that the appellants' allegations will stand against well pleaded and proved defenses. The holding is only that the District Court erred in dismissing the complaint on jurisdictional grounds. We have not attempted to weigh conflicting factual claims or draw conclusions of law which might favor either of the parties at the hearing on the merits.

Reversed and remanded.

[12] See Kohler et al. v. Jacobs et al., 138 F. 2d 449, 411

937 In the United States Court of Appeals for the District of Columbia

[Title omitted.]

Designation of record

Filed May 2, 1946

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Entire record filed in this Court.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

J. HOWARD MCGRATH,
Solicitor General.

Receipt of copy hereof this—day of May is hereby acknowledged.

CLINTON M. HESTER,
By MICHAEL M. KEARNEY.

938 In United States Court of Appeals for the District of Columbia

No. 9168—January Term, 1946

R. STANLEY DOLLAR ET AL., APPELLANTS

vs.

EMORY S. LAND ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia.

Before CLARK, WILBUR K. MILLER, and PRETTYMAN, JJ.

Judgment

Filed March 18, 1946

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Justice CLARK.

Dated March 18, 1946.

939 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order

Filed May 10, 1946

On consideration of appellees' motion to authorize Clerk to use original transcript of record in the above-entitled cause in preparing certified record to the Supreme Court for use in connection with petition for review on writ of certiorari, It is

Ordered by the Court that the motion be, and it is hereby, granted.

PER CURIAM.

Dated May 10, 1946.

940 [Clerk's certificate to foregoing transcript omitted in printing.]

941 In the Supreme Court of the United States

Stipulation as to printing of record

Filed June 17, 1946

Whereas, R. Stanley Dollar, Dollar Steamship Line, the J. Harold Dollar Estates Company and H. M. Lorber, hereafter called the Appellants, heretofore appealed to the United States Court of Appeals for the District of Columbia from a judgment of the District Court of the United States for the District of Columbia, dismissing their complaint against Emory S. Land, Howard L. Vickery, Edward Macauley, John M. Carmody, and Raymond S. McKeough and said Court of Appeals reversed the judgment, and the appellees on said appeal now propose to petition for writ of certiorari and are hereafter referred to as the petitioners; and,

Whereas, in taking said appeal the appellants designated as the record on appeal only the complaint, the order, judgment and

decree appealed from, the notice of appeal, the appeal bond, the statement of points on which appellant intended to rely on the appeal, and the designation of said documents; and

Whereas, the petitioners by counter-designation of record caused to be sent up to said United States Court of Appeals for the District of Columbia, certain additional papers, including those listed below; and

942 Whereas, the appellants have denied that any of said additional papers is part of the record on appeal herein or may be referred to in deciding the issues of said appeal, but do not desire to cause unnecessary printing and expense so long as they do not prejudice their own rights.

Now, therefore, it is stipulated, subject to this court's approval, and without prejudice to the contentions of the parties, by and between the attorneys for the respective parties hereto, for the purposes of said petition for writ of certiorari, that the following documents which physically appear in the certified transcript of record need not be printed and if sent up to this court in unprinted form may be referred to with exactly the same force and effect as if printed, but with no other force and effect. The papers thus referred to are as follows:

1. Exhibit A-1 to the affidavit of Emory S. Land—pp. 337-339
2. Exhibit A-2 to the affidavit of Emory S. Land—pp. 340-692
3. Exhibit C to the affidavit of Emory S. Land—pp. 702-714
4. District Court order permitting transmission of original Exhibits A-1 and A-2 to the affidavit of Emory S. Land to the Court of Appeals as part of the record on appeal—pp. 921-922.

J. HOWARD MCGRATH,
Solicitor General.

CLINTON M. HESTER,
Clinton M. Hester,
Counsel for Respondents R. Stanley Dollar, et al.

By MICHAEL M. KEARNEY,
432 Shoreman Building, Washington, D. C.

Signed at Washington, D. C., this 14th day of June 1946.

U. S. GOVERNMENT PRINTING OFFICE 1946

Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice BLACK took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1946

Motion to record in case No. 207

LIBRARY
SUPREME COURT U.S.

Supreme Court of the United States

No. 207—October Term 1946

EMORY S. LAND (CHAIRMAN, UNITED STATES MARITIME COMMISSION), HOWARD L. VICKERY (VICE CHAIRMAN, UNITED STATES MARITIME COMMISSION), ET AL., PETITIONERS

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, ET AL.

Order on motions to substitute

October 14, 1946

On consideration of the motions filed by the Solicitor General to substitute parties,

It is ordered that Richard Parkhurst be substituted as a party petitioner in the place and stead of Howard L. Vickery, deceased, and that W. W. Smith and Grenville Mellen, present members of the United States Maritime Commission, be added as parties petitioner. Further consideration of the question of eliminating Emory S. Land and Edward Macauley as parties petitioner is postponed to the hearing of the case on the merits.

Mr. Justice BLACK took no part in the consideration or decision of these motions.

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U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

Supreme Court, U. S.
FILED
JUN 17 1946
CHARLES ELMORE CROPLEY
CLERK

No. 207

In the Supreme Court of the United States

OCTOBER TERM, 1946

EMORY S. LAND, CHAIRMAN, UNITED STATES MARITIME COMMISSION, HOWARD L. VICKERY, VICE CHAIRMAN, UNITED STATES MARITIME COMMISSION, AND EDWARD MACAULEY, JOHN M. CARMODY, AND RAYMOND S. MCKEOUGH, MEMBERS OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR ESTATES COMPANY, AND H. M. LORBER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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OCTOBER TERM, 1946

No. 207

EMORY S. LAND, CHAIRMAN, UNITED STATES MARITIME COMMISSION, HOWARD L. VICKERY, VICE CHAIRMAN, UNITED STATES MARITIME COMMISSION, AND EDWARD MACAULEY, JOHN M. CARMODY, AND RAYMOND S. MCKEOUGH, MEMBERS OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR ESTATES COMPANY, AND H. M. LORBER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of John M. Carmody and Raymond S. McKeough, members of the United States Maritime Commission, Emory S. Land, former Chairman of the Commission, and Edward Macauley, a former member of the Commission,[1] prays that a writ of certiorari

[1] Emory S. Land and Edward Macauley resigned from the Commission on January 15, 1946, and May 21, 1946, respectively. Howard L. Vickery died on March 21, 1946. These

issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on March 18, 1946.

OPINIONS BELOW

The District Court of the United States for the District of Columbia wrote no opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 162–170) is reported at 154 F. (2d) 307.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1946 (R. 171–172). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the accepted procedure under Section 37 of the Judicial Code, which allows a district court to search the entire record for jurisdictional facts when its jurisdiction is questioned, is inapplicable to a proceeding where the jurisdictional doubt rests on the circumstance that the suit may be one against the United States, so that the district court must retain jurisdiction and

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facts are suggested by a motion, filed herewith, to substitute W. W. Smith, present Chairman of the Commission, who took office on June 1, 1946, and Richard Parkhurst, who became a member of the Commission on February 20, 1946. One vacancy exists in the membership of the Commission at this time.

proceed to a trial on the merits solely by virtue of allegations that the defendants are in unlawful possession of property under a void claim of title by the United States, where, at a hearing on motion for a preliminary injunction, uncontroverted evidence adduced by the defendants established the title of the United States.

2. Whether a suit brought against government officers to obtain possession of stock held by such officers under a claim of absolute ownership by the United States with documentary legal title in the United States, on the ground that such stock had been pledged to secure an indebtedness now satisfied, is a suit against the United States.

3. Whether the United States Maritime Commission, an agency of the United States, is subject to suit.

STATUTES INVOLVED

Section 37 of the Judicial Code, 28 U. S. C. 80, provides in part:

> If in any suit commenced in a district court * * * it shall appear to the satisfaction of the said district court, at any time after such suit has been brought * * * *, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, * * * the said district court shall proceed no further therein, but shall dismiss the suit * * * and shall make such order as to costs as shall be just.

Section 201 (a) of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U. S. C. 1111, provides in part:

> An agency is hereby created, to be known as the United States Maritime Commission (hereinafter referred to as the Commission). The Commission shall be composed of five persons, in this title referred to as members, to be appointed by the President by and with the advice and consent of the Senate. The President shall designate the member to act as chairman of the Commission, and the Commission may elect one of its members as vice chairman * * *.

Section 207 of the Merchant Marine Act, 1936, 49 Stat. 1988, as amended by Section 2 of the Act of June 23, 1938, 52 Stat. 954, 46 U. S. C. 1117, provides in part:

> The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. * * *.

STATEMENT

In April 1937, Dollar Steamship Lines, Inc., Ltd. (hereinafter called Dollar of Delaware) owed the United States more than $15,000,000, on ship sales notes, construction loans and other obligations, of which $3,000,000 had long been in default (R. 23). The company also was indebted to private creditors in an amount exceeding $2,000,000, and was without sufficient net income or current assets to meet amortization requirements (R. 23). Defaults on both Government and private obligations were increasing steadily (R. 23). Vessel maintenance had been neglected and sailings were made only with the greatest difficulty (R. 23). Both the Government and the company, in early 1937, had bankruptcy proceedings under consideration (R. 23).

The service operated by Dollar of Delaware, the only American-flag shipping service from the Pacific Coast to the Far East, had been found by the Maritime Commission to be essential to the commercial and military welfare of the United States (R. 22). Bankruptcy proceedings would have seriously interrupted and impaired this service (R. 23–24, 27). Further, such proceedings would have resulted in serious losses to trade creditors and considerable unemployment (R. 23–24).[2]

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[2] It was estimated that bankruptcy of the company would have resulted in an annual loss of purchasing power on the West Coast of approximately $10,000,000 (R. 26).

Nor could the Commission buttress Dollar of Delaware's position by an operating subsidy because it could not make the required statutory finding that the company possessed financial resources necessary to conduct the shipping operations involved (R. 24).[3] On the contrary, the Commission found that Dollar of Delaware was on the brink of bankruptcy and was being operated inefficiently (R. 22).

In an effort to preserve this essential steamship service, a partial rehabilitation of the company, including adjustment and capitalization of trade, bank, and intercompany debt, and the reconstitution of the board of directors, was consummated on January 25, 1938 (R. 24).[4] However, Dollar of Delaware's financial position continued to deteriorate and by March 1938 a complete cessation of its service was imminent (R. 25).

On April 28, 1938, the Commission advised respondent Dollar that it would arrange a five-year operating subsidy if the existing indebtedness of Dollar of Delaware to the Government could be

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[3] Even if an operating subsidy contract had existed, the default of Dollar of Delaware on obligations due the United States would have compelled the withholding of subsidy payments by the Commission (R. 24).

[4] A detailed report of this partial rehabilitation, entitled "Financial Readjustments in Dollar Steamship Lines, Inc., Ltd.," was made to Congress by the Maritime Commission on February 17, 1938 (R. 22). By stipulation (R. 172–173), this printed report, which is Exhibit "A–1" to the affidavit of Emory S. Land (R. 22), has not been reprinted.

guaranteed, the guarantees to be secured by a pledge of Dollar of Delaware's common stock (R. 25). This proposal was rejected (R. 25). Thereafter, the Dollar interests (respondents herein) suggested that the common stock held by them be transferred to the Commission (R. 25–26). The Commission accordingly authorized negotiations for the acquisition of this stock, the negotiations culminating in the contract of August 15, 1938, with respondents (and certain other stockholders) (R. 26–27, 8–18).

Briefly, the contract provided for the transfer by respondents of their common stocks in Dollar of Delaware (R. 9–11). In return, respondents Dollar of California and R. Stanley Dollar were released from their liability as co-obligors on Dollar of Delaware's obligation to the United States (R. 13–14).[5] Respondents R. Stanley Dollar and Lorber were also released from their obligations to Dollar of Delaware and indemnified by the latter with respect to their obligations to third parties (R. 13–14). The agreement contemplated a five-year operating subsidy to Dollar of Delaware, a loan from the Commission to the company

[5] The release of Dollar of California substantially benefited all respondents—as did certain mutual releases effected by the contract—by reason of stock ownership in Dollar of California and related companies. See Chart immediately preceding page 1 of Exhibit A–1 to the affidavit of Emory S. Land.

for vessel repair and reconditioning, and a working capital loan from the Reconstruction Finance Corporation (R. 15).

The transaction was completed prior to the close of 1938 (R. 27–28, 29). Respondents endorsed their common stock in blank and such stock, with transfer tax stamps affixed, was delivered to the Maritime Commission on October 26, 1938, through an escrow agent (R. 27–28).* Following the agreement of August 15, 1938, the name of Dollar of Delaware was changed to American President Lines, Ltd. (R. 29). By September 6, 1943, American President Lines, Ltd., had fully satisfied all indebtedness due the United States from its earnings (R. 29–30).

a. *The Complaint.*—The instant proceeding was instituted by respondents on November 6, 1945, in the District Court for the District of Columbia (R. 1). The complaint, referring to the inability of Dollar of Delaware to obtain an operating subsidy and to that company's indebtedness to the United States (R. 3, 4, 6), alleged that the Maritime Commission required it to enter the above-described contract of August 15, 1938, as a condi-

* By a report entitled "Reorganization of American President Lines, Ltd. (formerly Dollar Steamship Lines, Inc., Ltd.)," Congress was advised on April 10, 1939, of this entire transaction, including the legal and factual justification for the outright acquisition of the Dollar of Delaware stock.

Pursuant to stipulation (R. 172–173), this report, Exhibit A–2 to the affidavit of Emory S. Land, has not been reprinted.

tion to the granting of a subsidy (R. 4–5). A copy of the contract was attached to the complaint (R. 8–18). The complaint further alleged that Dollar of Delaware had been faced with the alternative of executing the contract or of becoming unable to meet its obligations as they accrued, and that the company was thus involuntarily forced to enter into the contract (R. 5). After characterizing the transfer of stock of respondents to the United States under the contract as "in fact and in legal effect" collateral security for the indebtedness of Dollar of Delaware to the United States (R. 6), the complaint charged that the contract was unauthorized and prohibited by the Merchant Marine Act and was accordingly unenforceable, and that legal title to the stock could not have been acquired pursuant to its terms (R. 6). The complaint alleged possession of the stock by petitioners under a claim of absolute ownership by the United States (R. 6), and sought to enjoin the then members of the Maritime Commission from selling the stock and to require them to turn it over to respondents (R. 7–8).[7]

b. *Proceedings in the District Court.*—A tem-

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[7] On or about July 6, 1943, the Maritime Commission publicly offered the stock here involved for sale (R. 30). Proposals received were considered and rejected on October 19, 1943 (R. 30). At the time of the institution of this suit, the Commission had under consideration substantial offers to purchase the stock (R. 30), but has, of course, taken no action with regard to such offers.

porary restraining order was issued against petitioners and a hearing on respondents' prayer for preliminary injunction was held on November 15, 1945 (R. 82). In affidavits opposing the prayer for an injunction, petitioners showed the facts set forth *supra*, pp. 4–8, and, in addition, that they had no personal interest in the subject matter of the suit (R. 22); that the stock in issue has been listed as an asset by the Commission in annual reports to Congress (R. 102–103); that respondents' counsel in closing the contract of August, 1938, had advised the Commission that valid title to the stock, free and clear, would be conveyed (R. 27–28); that counsel for respondent Estate of Dollar, to convey its stock in accordance with the contract, had petitioned a California court for, and obtained, an order authorizing the sale of the stock (R. 28); and that respondents Dollar, Lorber, and Dollar of California had, in 1938, reported the stock transaction here in issue as an absolute transfer for federal income tax purposes, taking credit for losses (R. 55–56).

At the November 15 hearing, petitioners suggested lack of jurisdiction to the district judge on the ground that the suit was one against the United States without its consent (R. 97–98). The district judge held a second hearing on December 20, 1945, on the question of jurisdiction (R. 111, 115).

Respondents offered no evidence. Admitting that the stock in question had been lawfully acquired and held by the United States until American President Lines had discharged its obligations to the Government in November 1943, respondents stated that their cause of action was for the return of pledged stock upon the satisfaction by the company of the underlying obligation (R. 123, 137, 143, 146–147). At the close of their argument, respondents stated that there was "* * * no real dispute upon the facts * * *" and urged the court to make final disposition of the case (R. 148).

The district judge dismissed the complaint on his own motion, stating: "I think two things. * * * this transaction was legal, in the sense that the Commission had the legal right; and therefore * * * it is inescapable that this is a suit against the United States * * *" (R. 152). An order was entered on December 21, 1945, denying the motion for a preliminary injunction and dismissing the complaint (R. 39).

c. *Proceedings in the Court of Appeals.*—The court below, on March 18, 1946, reversed the judgment of the district court and remanded the case for further proceedings not inconsistent with its opinion" (R. 171–172). It held that, since petitioners had not answered or moved for summary judgment, the "* * * proceedings below went only to the motion for a preliminary injunction

* * *" (R. 163). Accordingly, the court below stated that it must treat the case as having gone off on a motion to dismiss and, invoking a rule against speaking demurrers, refused to consider the evidence submitted by petitioners and limited itself to an examination of the allegations of the complaint (R. 164, 170).[8]

Adopting the pledge theory of respondents' cause of action, the court below held that the complaint stated a claim upon which relief could be granted, subject to the question of jurisdiction over suits against the United States (R. 164–166). As to the jurisdictional problem, it stated that, in a suit against a government officer which involved the question of suit against the United States, the preliminary decision for jurisdictional purposes is identical with the ultimate question in the suit and, accordingly, assertions of the complaint of

[8] The court below recognized that "* * * most, if not all, of the substantive elements necessary to a decision on the merits * * *" (R. 163) had been adduced by the parties in the district court. As noted above, both parties had agreed in the hearings before the district judge that no material issues of fact were presented (R. 112, 148). However, the court below, after limiting its review to the allegations of the complaint, referred to the "* * * complex and important substantive issues involved * * *," (R. 164) and referred to "* * * controversial questions of * * * fact proper for presentation to a trial court" (R. 170). Since the court below settled the jurisdictional defense adversely to petitioners, further proceedings in the district court would necessarily consist of a formal trial to establish facts already of record.

want of power in the officers are to be accepted at face value (R. 167–168). In applying that test, the court discussed the nature of the Maritime Commission and held that Congress had intended it to be a suable entity, a conclusion which was felt to support its view that the present suit was one within the jurisdiction of the district court (R. 168–170).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In failing to hold that this suit is one against the United States to which the United States has not consented.

2. In holding that the United States Maritime Commission is a suable entity.

3. In holding that the district court has jurisdiction of this suit.

4. In holding that the affidavits filed by petitioners could not be considered in determining the essential nature of this suit.

5. In holding that the district court was bound by the allegations of the complaint in determining whether it had jurisdiction to entertain the suit.

6. In reversing the judgment of the district court dismissing the complaint in this action.

REASONS FOR GRANTING THE WRIT

1. That the instant case is a suit against the United States in which the United States has

not consented to be sued was established by the uncontroverted affidavits submitted by the petitioners, which the court below improperly rejected. Its handling of this aspect of the jurisdictional problem runs counter to hitherto accepted judicial techniques, and fails to follow applicable decisions of this Court.

(a) The court below postponed inquiry into the district courts jurisdiction until the trial on the merits (R. 167–168, 170). But the decisions of this Court make it plain that whenever it is contended that a particular proceeding constitutes a suit against the United States, the jurisdictional inquiry must precede trial on the merits. *Oregon* v. *Hitchcock*, 202 U. S. 60, 68; *Minnesota* v. *Hitchcock*, 185 U. S. 373; cf. *Transcontinental & Western Air* v. *Farley*, 71 F. (2d) 288 (C. C. A. 2), certiorari denied, 293 U. S. 603.

(b) This Court has only recently had occasion to point out that, under Section 37 of the Judicial Code (28 U. S. C. 80), a district court once put on notice that its jurisdiction is in doubt must insist that the jurisdictional facts be established by evidence. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269. As those cases show, averments in the complaint are not sufficient to confer jurisdiction where the evidence contradicts the pleadings. While, in the cases cited, the jurisdictional defect involved the sum in controversy,

the sweep of Section 37 is amply broad enough to reach the present situation, where the immunity of the sovereign defeats jurisdiction of the cause. Any apparent jurisdiction which might have been inferred from the allegations of the complaint was challenged by petitioners, and was questioned by the district judge. In this posture of the case, the Court was free to look at the uncontroverted affidavits in the record in order to determine its jurisdiction.[9]

The widest latitude in procedure and proof is accorded a district court which inquires into its jurisdiction under Section 37 of the Judicial Code. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269; *Wetmore* v. *Rymer*, 169 U. S. 115; *Morris* v. *Gilmer*, 129 U. S. 315. In disregard of those decisions, and in the face of the flexible procedure there applied and approved, the court below has narrowly limited the scope of the jurisdictional inquiry by thus requiring a return to the rigid common law procedure which existed prior

[9] As petitioners pointed out in the court below, respondents' motion for a preliminary injunction necessarily put into issue the question of the court's jurisdiction (R. 107, 112). Cf. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 52–53. As a matter of settled practice, affidavits are a proper means of answering such a motion, and, standing undenied, may be presumed true. 3 Moore, *Federal Practice*, 3322. They are also proper on inquiries by district courts into their own jurisdiction under Section 37 of the Judicial Code. *Wetmore* v. *Rymer*, 169 U. S. 115; *Morris* v. *Gilmer*, 129 U. S. 315.

to the original enactment of Section 37 in 1875,[10] as to which see *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 183, the decision below sets back the clock by seventy years in an important aspect of federal procedure.

2. The complaint shows on its face that the suit is one against the United States. Paragraph 28 alleges that the stock now in question was transferred to the United States Maritime Commission (R. 6). Paragraphs 29 and 33 allege in addition that the stock is now held by agents of the United States under a claim of absolute ownership by the United States (R. 6–7). As a matter of law, in view of the circumstance that the Maritime Commission is merely an agency of the United States (46 U. S. C. 1111), possession of and documentary title[11] to the stock were, upon transfer to the Commission, conveyed to the United States. Cf. *Belknap* v. *Schild*, 161 U. S. 10, 25. Inasmuch as the complaint puts the United States' title in issue, the United States is an indispensable party; and, since it cannot be sued behind its back (*Louisiana* v. *Garfield*, 211 U. S. 70, 78), there is no jurisdiction in the absence of consent by the United States. See *Mine*

[10] As Section 5 of the Act of March 3, 1875, 18 Stat. 470, 472. For its subsequent transformation into Section 37 of the Judicial Code, see *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U. S. 283, 287–288.

[11] California Civil Code, Sec. 330.1; cf. *Radio Electronic Television Corp.* v. *Bartnicw Distributing Corp.*, 32 F. Supp. 431 (S. D. N. Y.).

Safety Co. v. *Forrestal*, 326 U. S. 371; *Morrison* v. *Work*, 266 U. S. 481; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Cunningham* v. *Macon & Brunswick* R. R. Co., 109 U. S. 446; cf. *Goldberg* v. *Daniels*, 231 U. S. 218.

Respondents' view, pressed in both courts below, that the action seeks the return of property pledged to secure a debt now said to be extinguished, simply emphasizes that the purpose of the suit is the specific performance of a contract with the United States. Here again, the United States is an indispensable party; it has not consented to be sued. The nominal defendants have no personal interest in the subject matter of the suit, and defend only as officers of the United States, the real party against whom the relief sought would necessarily run. For the relief sought by the respondents—the return of the allegedly pledged stock—could only be effected by petitioners (or by their successors in office) acting in an official capacity.[12] Such proceedings, as this Court (and, prior to this case, the court below) has consistently held, cannot be maintained in the absence of consent by the United States. *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371; *Morrison* v. *Work*, 266 U. S. 481; *Wells* v. *Roper*, 246 U. S. 335;

[12] *United States* v. *Lee*, 106 U. S. 196, and other trespass cases, *e. g.*, *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, relied upon by the court below, are not applicable. A judgment against petitioners herein in their individual capacities could not afford respondents the relief which they seek.

Belknap v. *Schild*, 161 U. S. 10, 18; *Hagood* v. *Southern*, 117 U. S. 52; *Louisiana* v. *Jumel*, 107 U. S. 711; *Boeing Air Transport* v. *Farley*, 75 F. (2d) 765 (App. D. C.), certiorari denied sub nom. *Pacific Air Transport* v. *Farley*, 294 U. S. 728; *Transcontinental & Western Air* v. *Farley*, 71 F. (2d) 288 (C. C. A. 2), certiorari denied, 293 U. S. 603; *Shoshone Irr. Dist.* v. *Ickes*, 70 F. (2d) 771 (App. D. C.), certiorari denied, 293 U. S. 571.

The court below, however, disregarded paragraphs 28, 29 and 33 of the complaint, in which the essential allegations were contained, and failed to give effect to the applicable decisions of this Court cited above.

3. The court below erroneously held that the Maritime Commission was a suable entity (R. 168–170), a result which it reached by finding an implied waiver of governmental immunity in the power-to-contract clause of Section 207 of the Merchant Marine Act of 1936, *supra*, p. 4.

This conclusion disregards the plain provisions of Section 201 of the Merchant Marine Act, *supra*, p. 4, which states that the Maritime Commission is an agency of the United States. The decision holds the Maritime Commission suable, in the absence of an express waiver by Congress; there is no "sue-and-be-sued" provision in the Merchant Marine Act. So far as immunity from suit is concerned, it is obviously of no significance that the Commission is empowered by Section 207 to

contract and otherwise carry its activities "in the same manner in which a private corporation may contract within the scope of the authority conferred by its charter." Every authorized activity of the United States is an exercise of governmental power, *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, and, except where Congress has waived it, federal immunity is coextensive with the entire scope of federal power. The broad authority to contract granted the Commission by Section 207 was deemed necessary in view of the complex business transactions contemplated for that agency by the Act which created it. To read into the provisions of Section 207 a waiver of immunity disregards a long line of decisions of this Court which prohibit such relinquishment of sovereign immunity by implication. *United States* v. *Sherwood*, 312 U. S. 584, 590; *United States* v. *Michel*, 282 U. S. 656; *Price* v. *United States*, 174 U. S. 373; *Schillinger* v. *United States*, 155 U. S. 163; cf. *United States* v. *Shaw*, 309 U. S. 495; *United States* v. *U. S. Fidelity Co.*, 309 U. S. 506.

4. The questions are of general importance. The decision below, in both its procedural and substantive aspects, will control the courts of the District of Columbia where most suits against government agencies originate. It is important not only that the waiver of immunity be not ex-

tended beyond the scope expressly authorized by Congress and in disregard of principles long announced by this Court, but also that the courts follow a procedure adapted "to secure the just, speedy, and inexpensive determination" (F. R. Civ. P., Rule 1) of jurisdictional questions on which the right to maintain an action depends.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

JUNE 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

No. 207

In the Supreme Court of the United States

OCTOBER TERM, 1946

EMORY S. LAND, ETC., ET AL., PETITIONERS

v.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR ESTATES COMPANY, AND H. M. LORBER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The District Court of the United States for the District of Columbia wrote no opinion. The opinion of the United States Court of Appeals for the Dis-

[1] Emory S. Land and Edward Macauley resigned from the Commission on January 15, 1946, and May 21, 1946, respectively. Howard L. Vickery died on March 21, 1946. These facts were suggested by a motion, filed with the Petition for Writ of Certiorari, to substitute W. W. Smith, present Chairman of the Commission, who took office on June 1, 1946, and Richard Parkhurst, who became a member of the Commission on February 20, 1946. Grenville Mellen took office on July 2, 1946, subsequent to the filing of the petition; this fact was suggested by a motion filed on July 17, 1946, to add Mr.

trict of Columbia (R. 162–170) is reported at 154 F. 2d 307.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1946 (R. 171–172). The petition for a writ of certiorari was filed on June 17, 1946, and granted on October 14, 1946 (R. 174). The jurisdiction of this Court rests upon the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the accepted procedure under Section 37 of the Judicial Code, which allows a district court to search the entire record for jurisdictional facts when its jurisdiction is questioned, is inapplicable to a proceeding where the jurisdictional doubt rests on the circumstance that the suit may be one against the United States, so that the district court must retain jurisdiction and proceed to a trial on the merits solely by virtue of allegations that the defendants are in unlawful possession of property under a void claim of title by the United States, where, at a hearing on motion for a preliminary injunction, uncontroverted evidence ad-

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Mellen. The term of John M. Carmody expired on September 26, 1946. One vacancy exists in the membership of the Commission at this time.

This Court, in granting certiorari, permitted the addition as petitioners of the new members of the Commission, but deferred action on the motion to dismiss those petitioners who are no longer with the Commission (R. 174).

duced by the defendants established the title of the United States.

2. Whether a suit brought against Government officers to obtain possession of stock held by such officers under a claim of absolute ownership by the United States with documentary legal title in the United States, on the ground that such stock had been pledged to secure an indebtedness now satisfied, is a suit against the United States.

3. Whether the United States Maritime Commission, an agency of the United States, is subject to suit.

STATUTES INVOLVED

Section 37 of the Judicial Code, 28 U. S. C. 80, provides in part:

> If in any suit commenced in a district court * * * it shall appear to the satisfaction of the said district court, at any time after such suit has been brought * * *, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, * * * the said district court shall proceed no further therein, but shall dismiss the suit * * * and shall make such order as to costs as shall be just.

Section 101 of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U. S. C. 1101, provides in part:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry

its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, * * *. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

Section 201 (a) of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U. S. C. 1111, provides in part:

> An agency is hereby created, to be known as the United States Maritime Commission (hereinafter referred to as the Commission). The Commission shall be composed of five persons, in this title referred to as members, to be appointed by the President by and with the advice and consent of the Senate. The President shall designate the member to act as chairman of the Commission, and the Commission may elect one of its members as vice chairman. * * * Vacancies in the Commission, so long as there shall be three members in office, shall not impair the power of the Commission to execute its functions, and three of the members in office shall constitute a quorum for the transaction of the business of the Commission. * * *

Section 207 of the Merchant Marine Act, 1936, 49 Stat. 1988, as amended by Section 2 of the Act of

June 23, 1938, 52 Stat. 954, 46 U. S. C. 1117, provides in part:

> The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. * * *

STATEMENT

In April 1937, Dollar Steamship Lines, Inc., Ltd. ("Dollar of Delaware") owed the United States more than $15,000,000 on ship sales notes, construction loans, and other obligations, on which $3,000,000 had long been in default (R. 23). The company also was indebted to private creditors in an amount exceeding $2,000,000, and was without sufficient net income or current assets to meet amortization requirements (R. 23). Defaults on both Government and private obligations were increasing steadily (R. 23). Vessel maintenance had been neglected and sailings were made only with the greatest difficulty (R. 23).

In early 1937, both the Government and the company had under consideration bankruptcy proceedings (R. 23); such proceedings would have seriously interrupted and impaired the service operated by Dollar of Delaware, the only American-flag shipping service from the Pacific Coast to the Far East,

which the Maritime Commission had found to be essential to the commercial and military welfare of the United States; they would also have resulted in serious losses to trade creditors and considerable unemployment (R. 22, 23–24, 27).[2] Nor could the Commission buttress Dollar of Delaware's position by an operating subsidy because it could not make the required statutory finding that the company possessed financial resources necessary to conduct the shipping operations involved (R. 24).[3] On the contrary, in the Commission's judgment, Dollar of Delaware was on the brink of bankruptcy, and was being operated inefficiently and in a manner detrimental to the interest of the United States (R. 22).

In an effort to preserve this essential steamship service, a partial rehabilitation of the company, including adjustment and capitalization of trade, bank, and intercompany debt, and a reconstitution of the board of directors, was consummated on January 25, 1938 (R. 24).[4] However, Dollar of

[2] It was estimated that bankruptcy of the company would have resulted in an annual loss of purchasing power on the West Coast of approximately $10,000,000 (R. 26).

[3] Even if an operating subsidy had been granted, the default of Dollar of Delaware on obligations due the United States would have compelled the withholding of subsidy payments by the Commission (R. 24).

[4] A detailed report of this partial rehabilitation, entitled "Financial Readjustments in Dollar Steamship Lines, Inc., Ltd." (Exhibit "A–1" to the affidavit of Emory S. Land), was made to Congress by the Maritime Commission on February 17, 1938 (R. 22). By stipulation, this printed report has not been reprinted, but is on file with the Clerk of this Court as part of the record (R. 172–173).

Delaware's financial position continued to deteriorate, and, by March 1938, a complete cessation of its service was imminent (R. 25).

On April 28, 1938, the Commission advised respondent Dollar that it would arrange a five-year operating subsidy if the existing indebtedness of Dollar of Delaware to the Government could be guaranteed, the guarantees to be secured by a pledge of all of the stock—preferred as well as common—of Dollar of Delaware, held by Robert Dollar Company and respondents Dollar and Dollar of California (R. 25). This proposal was rejected (R. 25). Thereafter, it was suggested that the Dollar interests (respondents herein) would agree to transfer to the Commission title to the common stock held by them (R. 25–26). The Commission accordingly authorized negotiations for the acquisition of this stock, the negotiations culminating in the contract of August 15, 1938, with respondents (and certain other stockholders) (R. 26–27, 8–18).

Briefly, the contract provided for the transfer by respondents of their common stock in Dollar of Delaware (R. 9–11). In return, respondents Dollar of California and R. Stanley Dollar were released from their liability as co-obligors on Dollar of Delaware's obligation to the United States (R. 13–14).[3]

[3] The release of Dollar of California substantially benefited all respondents—as did certain mutual releases effected by the contract—by reason of stock ownership in Dollar of California and related companies. See Chart immediately preceding page 1 of Exhibit A–1 to the affidavit of Emory S. Land.

Respondents R. Stanley Dollar and Lorber were also released from their obligation to Dollar of Delaware and were to be indemnified by the latter with respect to their obligations to third parties (R. 13–14). The agreement contemplated a five-year operating subsidy to Dollar of Delaware, a loan of $1,500,000 from the Commission to the company for vessel repair and reconditioning, and a working capital loan of $2,000,000 from the Reconstruction Finance Corporation (R. 15).[6]

The transaction was completed prior to the close of 1938 (R. 27–28, 29). Respondents endorsed their common stock in blank and, with transfer tax stamps affixed, it was delivered to the Maritime Commission on October 26, 1938, through an escrow agent (R. 27–28).[7] Following the agreement of August 15, 1938, the name of Dollar of Delaware was changed to American President Lines, Ltd. (R. 29). By September 6, 1943, American President Lines, Ltd., had fully satisfied all indebtedness

[6] The Commission eventually made a loan of $2,000,000 to the company and the Reconstruction Finance Corporation loaned $2,500,000. See report of the Commission to Congress entitled "Reorganization of American President Lines, Ltd." (formerly Dollar Steamship Lines, Ltd.), pp. 280–283. This report is Exhibit A–2 to the affidavit of Emory S. Land. Pursuant to stipulation, this printed report has not been reprinted, but is on file with the Clerk of this Court as part of the record (R. 172–173).

[7] Congress was advised, on April 10, 1939, of this entire transaction, including the legal and factual justification for the outright acquisition of the Dollar of Delaware stock (Exhibit A–2 to the affidavit of Emory S. Land).

due the United States from its earnings realized subsequent to October 26, 1938 (R. 29–30).

a. *The complaint.*—The instant proceeding was instituted by respondents on November 6, 1945, in the District Court for the District of Columbia (R. 1). The complaint, referring to the inability of Dollar of Delaware to obtain an operating subsidy and to that company's indebtedness to the United States (R. 3, 4, 6), alleged that the company had been faced with the alternative of executing the contract and surrendering the stock—requirements imposed by the Maritime Commission as a condition to the granting of a subsidy—or of becoming unable to meet its obligations as they accrued, and that the company was thus involuntarily forced to enter into the contract (R. 4–5). A copy of the contract was attached to the complaint (R. 5, 8–18). After characterizing the transfer of stock of respondents to the United States under the contract as "in fact and in legal effect" collateral security for the indebtedness of Dollar of Delaware to the United States (R. 6), the complaint alleged possession of the stock by petitioners under a claim of absolute ownership by the United States (R. 6), and prayed that the then members of the Maritime Commission be enjoined from selling the stock and that they be directed to turn it over to respondents (R. 7–8).[5]

[5] On or about July 6, 1943, the Maritime Commission publicly offered the stock here involved for sale (R. 30). Propo-

b. *Proceedings in the district court.*—A temporary restraining order was issued against petitioners, and a hearing on respondents' prayer for preliminary injunction was held on November 15, 1945 (R. 82). In affidavits opposing the prayer for an injunction, petitioners showed the facts set forth *supra*, pp. 5–9, and, addition, that they had no personal interest in the subject matter of the suit (R. 22); that the stock in issue had been listed as an asset by the Commission in annual reports to Congress (R. 102–103); that respondents' counsel, in closing the contract of August 1938, had advised the Commission that valid title to the stock, free and clear, would be conveyed (R. 27–28; 38–41); that counsel for respondent Estate of Dollar, to convey its stock in accordance with the contract, had petitioned a California court for, and obtained, an order authorizing the sale of the stock (R. 28; 42–48); and that respondents Dollar, Lorber, and Dollar of California had, in 1938, reported the stock transaction here in issue as an absolute transfer for federal income tax purposes, taking credit for losses (R. 55–57, 63, 69, 78).

At the November 15 hearing, petitioners suggested lack of jurisdiction to the district judge on the ground that the suit was one against the United

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sals received were considered and rejected on October 19, 1943 (R. 30). At the time of the institution of this suit, the Commission had under consideration substantial offers to purchase the stock (R. 30), but has, of course, taken no action with regard to such offers.

States without its consent (R. 97–98). The district judge thereafter ordered a second hearing on the question of jurisdiction which was held on December 20, 1945 (R. 111, 115). Respondents offered no evidence at either hearing. Admitting that the stock in question had been lawfully acquired and held by the United States until American President Lines had discharged its obligations to the Government in November 1943, respondents stated that their cause of action was for the return of pledged stock upon the satisfaction by the company of the underlying obligation (R. 123, 137, 143, 146–147). At the close of their argument, respondents stated that there was "no real dispute upon the facts" and urged that "a final decree, instead of an interlocutory injunction, may be rendered at this time" (R. 148).

The district judge dismissed the complaint on his own motion, stating: "I think two things. One is that this transaction was legal, in the sense that the Commission had the legal right; and therefore I think it is inescapable that this is a suit against the United States" (R. 152). An order was entered on December 21, 1945, denying the motion for a preliminary injunction and dismissing the complaint on the court's own motion (R. 79).

c. *Proceedings in the Court of Appeals.*—The court below reversed the judgment of the district court and remanded the case for further proceedings not inconsistent with its opinion (R. 171–172).

It held that, since petitioners had not answered or moved for summary judgment, the "proceedings below went only to the motion for a preliminary injunction" (R. 163). Accordingly, the court below stated that it must treat the case has having gone off on a motion to dismiss and, invoking a rule against speaking demurrers, refused to consider the evidence submitted by petitioners and limited itself to an examination of the allegations of the complaint (R. 164, 170).[9]

Adopting the pledge theory of respondents' cause of action, the court below held that the complaint stated a claim upon which relief could be granted, subject to the question of jurisdiction over suits against the United States (R. 164–166). As to the jurisdictional problem, it stated that, in a suit against a government officer which involved the question of suit against the United States, the preliminary decision for jurisdictional purposes is identical with the ultimate question in the suit and

[9] The court below recognized that "most, if not all, of the substantive elements necessary to a decision on the merits" (R. 163) had been adduced by the parties in the district court. As noted above, both parties had finally agreed, in the hearings before the district judge, that no material issues of fact were presented (R. 112, 148). Consequently, further proceedings in the district court would necessarily consist of a formal trial to establish facts already of record. But the court below, after limiting its review to the allegations of the complaint, referred to the "complex and important substantive issues involved" (R. 164), and "controversial questions of * * * fact proper for presentation to a trial court" (R. 170).

accordingly, assertions in the complaint of want of power in the officers are to be accepted at face value (R. 167–168). In applying that test, the court discussed the nature of the Maritime Commission and found that Congress had intended it to be a suable entity, a conclusion which was felt to support its view that the present suit was one within the jurisdiction of the district court (R. 168–170).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In failing to hold that this suit is one against the United States to which the United States has not consented.

2. In holding that the United States Maritime Commission is a suable entity.

3. In holding that the district court has jurisdiction of this suit.

4. In holding that the affidavits filed by petitioners could not be considered in determining the essential nature of this suit.

5. In holding that the district court was bound by the allegations of the complaint in determining whether it had jurisdiction to entertain the suit.

6. In reversing the judgment of the district court dismissing the complaint in this action.

SUMMARY OF ARGUMENT

I

The court below refused to consider the information contained in petitioners' affidavits filed in op-

position to respondents' motion for a preliminary injunction and implictly held that the district court should also have rejected these affidavits. But the basis of this position—that the affidavits raised controversial factual questions—does not reflect the true situation since, in the district court, both parties admitted that there was no genuine issue of material fact involved.

Moreover, the district court could properly consider the affidavits. The lack of jurisdiction suggested by petitioners was an obstacle not only to the granting of a preliminary injunction but to the maintenance of the proceeding in its entirety—a situation falling within the express language and purpose of Section 37 of the Judicial Code. A district court resolving jurisdictional doubt under that Section has discretion to inquire into the facts as they really exist and, in so inquiring, frequently considers affidavits. *Morris* v. *Gilmer*, 129 U. S. 315; *Wetmore* v. *Rymer*, 169 U. S. 115. The propriety of considering the affidavits in these circumstances is supported by the well-established practice of the filing of affidavits in support of a motion to dismiss or for summary judgment based on jurisdictional grounds. Since Section 37 permits a district court to consider jurisdictional questions in the absence of formal motion of the parties, but leaves unchanged the substantive basis for action, the district court's power to inquire into a jurisdictional question on its own motion is at least as

broad as, if not broader than, its power to act on such question upon the motion of one of the parties. The sole difference between these two situations is the source of the motion, but that should be without legal consequence, since that difference could not and does not harm respondents in any way. Under both procedures, the court is required to give respondents notice and opportunity to be heard and present evidence on the jurisdictional question. These requirements were satisfied in the present case.

II

Respondents' theory in suing petitioners as private individuals is that the original transfer of the stock under the 1938 contract was as security for a debt and that since the debt is now extinguished, petitioners' refusal to return the stock was wrongful. Under the contract, however, possession of, and title to, the stock here involved was validly transferred to the United States, which possession and title the United States still has and claims. We point out that, because of these facts, this proceeding clearly is a suit against the United States whether the complaint is taken together with the affidavits or alone. We do not attempt to reconcile the cases in this field, for we believe that the lines of authority culminating in the recent *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, govern the present situation, and that *United States* v. *Lee*,

106 U. S. 196, relied on by respondents, is inapplicable. The discussion of that question also demonstrates that the lack of jurisdiction is clear without looking to the merits, contrary to the holding of the court below.

A. When the complaint is viewed together with the affidavits, it is apparent that the United States is the real party in interest and that this suit is not maintainable without its consent. Petitioners have no individual interest in the stock and claim no individual title or right to possession to the stock. The United States has, and claims the right to retain, possession and title to the stock, and the entire impact of the decree would be solely, and directly, upon that possession and title.

B. When the complaint is read alone, it appears that respondents seek an order enjoining petitioners from selling the stock and directing them to return it to respondent. That such relief could not be secured against petitioners as private individuals is conclusively shown, and, therefore, this relief cannot be secured against the four petitioners who no longer are members of the Maritime Commission. On the other hand, since the United States lawfully acquired possession of and title to, the stock, and since the return of the stock is allegedly due respondents by virtue of the contract, the proceeding is in effect a suit for specific performance of a contract with the United States. It is no different from an attempt to reach money in the hands

of the Government, which likewise is barred by sovereign immunity.

C. *United States* v. *Lee*, 106 U. S. 196, relied on by respondents, is inapplicable. In that case, the original taking was a trespass whereas here no trespass occurred either at the original taking or any time thereafter. In addition, the action in the *Lee* case was ejectment, which put in issue only the right to possession, and not the title to the land claimed by the United States. This limitation in the *Lee* case, recognized in that and subsequent cases, makes it clear that that case does not govern situations, such as the present one, which involve the rights of the United States to retain title to property.

D. The statement of the court below that the Maritime Commission is suable, if intended to support the conclusion that the suit was against individuals, is irrelevant, since, in the absence of an attempt to sue the Maritime Commission, it is immaterial whether the Commission is suable. As an independent basis of jurisdiction, the statement assumes that the suit is against the Maritime Commission, contrary to respondents' position. In any case, there is no express waiver of immunity generally in the Merchant Marine Act of 1936, as amended, or in Section 207 of that Act which the court below relies on, and to imply such a waiver disregards a long line of decisions forbidding such implication.

ARGUMENT

I

THE DISTRICT COURT PROPERLY CONSIDERED THE UNCONTROVERTED FACTS CONTAINED IN PETITIONERS' AFFIDAVITS FILED IN OPPOSITION TO RESPONDENTS' MOTION FOR A PRELIMINARY INJUNCTION

Respondents, in their complaint, requested a preliminary injunction as well as a permanent injunction and an order directing the petitioners to deliver the stock to respondents (R. 7–8). Two hearings were held on the motion for a preliminary injunction, the first on November 15, 1945, the second on December 20, 1945 (R. 82, 115). At the outset, petitioners did not formally move to dismiss or for summary judgment, but instead opposed in open court the granting of a preliminary injunction on the ground, *inter alia*, that since the proceeding was an effort "to divest the United States of property, which it possesses and to which it asserts title" (R. 97) it was a suit against the United States, to which it had not consented and that the court was without jurisdiction in the premises. In support of their position, petitioners submitted to the court the affidavits here involved. Argument thereafter was addressed principally to the jurisdictional question thus suggested to the court.

At the close of the first hearing, the district court informed respondents that it would like to hear from them on the question "whether this Court has jurisdiction, which I must say at this moment I

doubt very much, because it does seem to me an action which would divest the government of property, and therefore a suit against the United States" (R. 111). Respondents agreed to submit a brief on that question and at the second hearing on December 20, more than a month later, new counsel was introduced as desiring "to argue the question of jurisdiction for the plaintiffs" (R. 115).

At no time in the course of the two hearings before the district court or the Court of Appeals did respondents challenge the truth of the information contained in petitioners' affidavits.[10] On the contrary, respondents expressed the opinion before the district court that there was no "real dispute upon the facts," and that the proceeding raised "really a question of law" (R. 148); they further suggested that the parties agree "that this hearing may be deemed a hearing upon the merits of the case, and that a final decree, instead of an interlocutory injunction, may be rendered at this time" (R. 148).[11] In these circumstances, the respondents' reliance (Br. in Opp., pp. 3–4, 17) on *Polk Company* v. *Glover*, 305 U. S. 5, 8, and *Gibbs* v. *Buck*, 307 U. S. 66, 76, is misplaced. In those cases, the Court held that affidavits which are part of the record only for the purpose of determining the propriety of the temporary injunction may not be considered in passing

[10] Nor was the propriety of considering the affidavits questioned by respondents at any time in the district court.

[11] Counsel for petitioners had earlier suggested that there was no genuine issue of material fact (R. 112).

on a motion to dismiss for failure to state a cause of action. But the affidavits filed in this case were conceded to be of broader significance. Here the respondents did "submit the case to be decided upon the merits upon the bill * * * and affidavits." *Polk Company* v. *Glover*, 305 U. S. at 9. See also *infra*, note 13, p. 25.

Although the Court of Appeals stated that it recognized that the parties, "during the course of their argument * * * may have placed before the lower court most, if not all, of the substantive elements necessary to a decision on the merits" (R. 163), and that respondents regarded the proceeding as presenting no factual issue and as pointing toward a final determination on the merits (R. 164), it refused to consider the affidavits in determining the jurisdictional question. Instead it confined itself to the complaint alone, since, in its opinion, the affidavits "raise controversial questions of law and fact proper for presentation to a trial court" (R. 170) and hence to consider the affidavits would "infringe upon the lower court's prerogative to decide the case on the merits" (R. 170).

In the light of what transpired in the district court, we hardly need labor the misconception of the court below, nor attempt to answer the argument presently made by respondents (Br. in Opp., pp. 18–19) that there are questions of fact, preliminary to a decision on the jurisdictional question, which require resolution by a trial court, since as

we have already pointed out, (*supra*, p. 19), respondents admitted that there was no dispute on the facts. We therefore discuss the refusal of the court below, and its implicit denial of a right in the district court, to consider the undisputed factual information contained in the affidavits in determining whether the proceeding was in effect a suit against the United States, and point out that under Section 37 of the Judicial Code, the district court properly could consider such affidavits in determining its jurisdiction.

A. *Under the authority to raise jurisdictional questions sua sponte, vested in a district court by Section 37 of the Judicial Code, the court may consider any evidence, including affidavits then in the record.*—In the present case, when petitioners opposed the motion for a preliminary injunction on the ground that the proceeding was a suit against the United States to which it had not consented, such opposition was, of course, not limited solely to the granting of the injunction but included the entire proceedings then pending in the district court, since the basis of the opposition, if valid, is incapable of remedy by amendment, and therefore would require not only a denial of the injunction but a dismissal of the complaint as well (R. 97). *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 52–53; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269; *United States* v. *Corrick*, 298 U. S. 435, 440; *Morris* v. *Gilmer*, 129 U. S. 315, 325; cf. *Meccano, Ltd.* v.

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John Wanamaker, 253 U. S. 136, 141; *United States Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, 214; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 525. Because of the fundamental nature of the question thus raised, once a district court has been put on notice that its jurisdiction is in doubt, the court is explicitly charged with the duty of determining whether it has jurisdiction, regardless of the stage of the proceeding. Unless the existence of jurisdiction is shown to its satisfaction, the district court is barred from proceeding any "further therein but shall dismiss the suit or remand it to the court from which it was removed." Section 37 of the Judicial Code;[12] see *Morris* v. *Gilmer*, 129 U. S. 315; *Wetmore* v. *Rymer*, 169 U. S. 115; *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269; cf. *United States* v. *Corrick*, 298 U. S. 435, 440, and cases there cited. This duty imposed on the district court has also been recognized in Rule 12 (h) of the Federal Rules of Civil Procedure dealing with "Waiver of Defenses" which provides in part "(2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the

[12] Section 37 of the Judicial Code was enacted into law as Section 5 of the Act of March 3, 1875, 18 Stat. 470, 472. For its subsequent transformation into Section 37, see *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 287–288. Prior to 1875, questions concerning the jurisdiction of the court could be raised only by a plea in abatement in the nature of a plea to the jurisdiction. See *Farmington* v. *Pillsbury*, 114 U. S. 138, and cases there cited.

subject matter, the court shall dismiss the action." See *Notes of Advisory Committee on Federal Rules of Civil Procedure*, Note to Subdivision (h) of Rule 12.

In resolving the jurisdictional doubt, the district court was "not bound by the pleadings of the parties but [could], of its own motion, if led to believe that its jurisdiction is not properly invoked, 'inquire into the facts as they really exist.'" *McNutt* v. *General Motors Acceptance Corp.*, *supra*, 184, 189; *Wetmore* v. *Rymer*, 169 U. S. 115, 120; *Anderson* v. *Watt*, 138 U. S. 694; *Steigleder* v. *McQuesten*, 198 U. S. 141, 143. Such inquiry may be conducted in such manner as the court sees fit, since "it would appear to have been the intention of Congress to leave the mode of raising and trying such issues to the discretion of the trial judge." *Wetmore* v. *Rymer*, *supra*, at 121; *McNutt* v. *General Motor Acceptance Corp.*, *supra*; *Gilbert* v. *David*, 235 U. S. 561, 568; *Anderson* v. *Watt*, 138 U. S. 694. The conduct of such inquiry by affidavits, as in the instant case, has long been accepted (*Morris* v. *Gilmer*, 129 U. S. 315; *Wetmore* v. *Rymer*, *supra*; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269) and has been utilized not only in the district court but in this Court as well to resolve jurisdictional questions. *Roura* v. *Philippine Islands*, 218 U. S. 386; *Williamson* v. *Kincaid*, 4 *Dall.* 20; *Rush* v. *Parker*, 5 Cranch 287; cf. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 588.

Although most of the authorities permitting the use of affidavits in jurisdictional inquiries under Section 37 involve either questions of jurisdictional amount or diversity of citizenship, that fact alone does not, we submit, make them inapplicable. There is nothing in the Section itself nor has anything been suggested by respondents which would support any such limitation on its application. On the other hand, no court has jurisdiction in suits against the United States to which it has not consented, and, hence, an attempt to maintain such a proceeding clearly falls with the express language of Section 37, which extends to suits which do "not really and substantially involve a dispute or controversy properly within the jurisdiction of such district court." In addition, the absence of jurisdiction in such a proceeding is not remediable and one of the manifest purposes of Section 37 is to enable the district court, in the interest of efficient judicial administration, to dismiss fatally defective bills on its own motion, and thus avoid needless litigation, delay, and expense. Accordingly, we submit that jurisdictional questions arising out of a claim to sovereign immunity are within the scope of Section 37, and that the accepted procedures under that Section are applicable.

B. *A district court's power under Section 37 is no less than its power on motion to dismiss or for summary judgment where the information contained in such affidavits may properly be consid-*

cred.—The practice in disposing of jurisdictional questions raised on motion of one of the parties reinforces this conclusion. If instead of informally suggesting to the district court its lack of jurisdiction, petitioners had formally filed a motion to dismiss or for summary judgment, there would be no question as to the propriety of the district court's consideration of affidavits. Rule 56 of the Federal Rules of Civil Procedure expressly provides for the filing of affidavits in support of the motion for summary judgment, and although Rule 12 (b) does not expressly so permit, the Court of Appeals for the District of Columbia as well as the majority of the circuit courts of appeals have approved the filing of affidavits in support of a motion to dismiss pursuant to Rule 12 (b) (1) through (5) [13] on the

[13] Unlike the virtually unanimous approval of affidavits supporting motions to dismiss based on the grounds set forth in Rule 12 (b) (1) through (5), which includes jurisdictional objections, there appears to be considerable doubt as to the propriety of considering affidavits on a motion to dismiss for failure to state a cause of action (Rule 12 (b) (6)). 1 Moore, *Federal Practice*, pp. 646–647, and cases cited in 1945 Supplement. It is this latter ground which is involved in that part of this Court's opinion in *Gibbs* v. *Buck*, 307 U. S. 66, 76–77, and *Polk Company* v. *Glover*, 305 U. S. 5, 9, on which respondents have relied as support for the proposition that the district court could not consider the affidavits in determining its jurisdiction on a motion for preliminary injunction (Br. in Opp., pp. 3–4, 17). But that ground is not involved in the instant case. On the other hand, in *Gibbs* v. *Buck*, the motion to dismiss opposing the motion for preliminary injunction was also based on the absence of the requisite jurisdictional amount; in determining that question, this

ground that it is not important whether the objection is called a motion to dismiss or one for summary judgment. Since the same relief is sought, the difference in name is unimportant. In any event the affidavits presented are available on either motion." *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 85, 87 (C. C. A. 2); *National War Labor Board* v. *Montgomery Ward & Co., Inc.*, 144 F. 2d 528 (App. D. C.); *Gallup* v. *Caldwell*, 120 F. 2d 90 (C. C. A. 3); *Victory* v. *Manning*, 128 F. 2d 415 (C. C. A. 3); *Lucking* v. *Delano*, 129 F. 2d 283 (C. C. A. 6); *Carroll* v. *Morrison Hotel Corp.*, 149 F. 2d 405 (C. C. A. 7); *Davis* v. *Schackleford*, 91 F. 2d 148 (C. C. A. 8).

Since affidavits may properly be considered in determining a jurisdictional doubt raised on motion of one of the parties, such affidavit should likewise be available when the same jurisdictional doubt is suggested by one of the parties and the court acts on its own motion as it is authorized and required

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Court considered statements outside the complaint as a matter of course and, citing *Wetmore* v. *Rymer*, *McNutt* v. *General Motors Acceptance Corp.*, and *KVOS* v. *Associated Press*, relied on by petitioners, *supra*, pp. 22, 23, stated "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court" (307 U. S. at 71-72). Such language is commonly used in regard to Section 37 and its use here lends additional support to petitioners' position that the two procedures above discussed are basically the same. In passing, it may be noted that respondents' reliance on cases where affidavits were filed to support a motion to dismiss filed by one of the parties appears inconsistent with their theory that such cases are here inapplicable (Br. in Opp., pp. 17, 19).

to do under Section 37. Prior to the enactment of Section 37, such jurisdictional questions could be raised only on a plea filed by one of the parties, and Section 37 "altered the practice by requiring the court to dismiss or remand on its own motion in a proper case although want of jurisdiction was not raised by appropriate motion or by plea or answer, but did not change the substantial basis for the court's action." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 287–288. The district court's power to inquire into its jurisdiction on its own motion would, therefore, seem to have at least the same scope as its power to act on the motion of one of the parties. *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 87 (C. C. A. 2); *Hackner* v. *Guaranty Trust Co. of New York*, 117 F. 2d 95 (C. C. A. 2); cf. *Gibbs* v. *Buck*, 307 U. S. 66, 72; *Davis* v. *Schackleford*, 91 F. 2d 148, 150 (C. C. A. 8). As a matter of fact, since as has been pointed out, *supra*, p. 23, the mode of trying such issues under Section 37 has been left to the discretion of the court, the scope of the district court's power to conduct such an inquiry on its own motion under Section 37 might well be broader than when the issue is raised on motion of one of the parties.

The only difference between the situation where the court acts upon the motion of one of the parties and where it acts upon a party's suggestion and its own motion is one which should be without legal consequence. In the latter situation there is no

formal motion by one of the parties to dismiss or for summary judgment; it is the court's own motion which is being acted upon. But that difference could not, and did not, harm respondents in any way, for, regardless of the movant, the requirements of notice and opportunity to be heard and present evidence under both procedures are the same.[14] Valid action under Section 37 as upon a motion to dismiss or for summary judgment (Rule 56 (c) of F. R. Civ. P.), cannot be taken without giving the parties to be affected by the dismissal "reasonable notice and an opportunity to produce evidence and to be heard upon the question of the verity of the jurisdictional fact." *Davis* v. *Schackleford*, 91 F. 2d 148, 150 (C. C. A. 8); *Hartog* v. *Memory*, 116 U. S. 588, 591; *Wetmore* v. *Rymer, supra; Morris* v. *Gilmer, supra; Huntington* v. *Laidley*, 176 U. S. 668, 678. And in the present proceeding, these requirements have been met; petitioners' opposition to the issuance of the preliminary injunction on jurisdictional grounds at the outset of the first hearing and the district court's request addressed to respondents for a memorandum of points and authorities on the jurisdictional question at the close thereof (*supra,*

[14] Respondents have suggested that because of the absence of a motion to dismiss, they were deprived of an opportunity to amend their complaint (Br. in Opp., p. 4). This suggestion is not consistent with the facts; at the hearings before the district court, respondents requested, and were granted, permission to correct formal inaccuracies (R. 116), but these corrections were not in fact made.

pp. 18–19) fully "apprised" respondents that their complaint might be dismissed on jurisdictional grounds. In addition, at the second hearing more than a month later, a new counsel was introduced specifically for the purpose of arguing the jurisdictional issue and his subsequent two-hour argument devoted primarily to that question not only indicated beyond any doubt respondents' awareness of that possibility but showed further that respondents were being accorded an opportunity to be heard.

Since the Rules of Civil Procedure are to be "construed to secure the just, speedy, and inexpensive determination of every action" (Rule 1 of F. R. Civ. P.), the failure of petitioners formally to move to dismiss or for summary judgment should not be thought to require a different result, particularly since respondents were not injured by such omission. We submit, therefore, that inasmuch as affidavits may properly be considered in proceedings under Rule 12 (b) (1) through (5), such affidavits are also proper in Section 37 proceedings.

II

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FOR LACK OF JURISDICTION SINCE THIS IS A SUIT AGAINST THE UNITED STATES, TO WHICH IT HAS NOT CONSENTED

The facts pertinent to the jurisdictional issue are as follows: On August 15, 1938, respondents entered into a contract with the Maritime Commission, providing for a transfer of the stock involved to the

Commission. The contract contained no limitation on the transfer. (R. 8–18.) In accordance with the provisions of the contract, respondents endorsed the stock in blank and, with stock transfer stamps affixed, caused them to be delivered to the Commission (R. 27–28), thereby delivering possession and documentary legal title to the Commission. *Radio Electronic Television Corp.* v. *Bartniew Distributing Corp.*, 32 F. Supp. 431 (S. D. N. Y.); Uniform Stock Transfer Law, Sec. 1; Calif. Civil Code, Sec. 330.1. The Commission since then has been in uninterrupted possession of the stock and documentary title. Since the Maritime Commission is exclusively an agency of the United States (Section 201 (a) of the Merchant Marine Act, 49 Stat. 1985, 46 U. S. C. 1111 (a)), its possession of, and documentary title to the stock are obviously that of the United States.

Although respondents have not even remotely suggested that petitioners have any individual interest in the stock involved or that they claim any individual title thereto or right of possession thereof, respondents are suing petitioners as private individuals for the return of the stock, alleging that the "transfer was in fact and in legal effect collateral security for the indebtedness" of Dollar of Delaware to the Maritime Commission (R. 6)[15] and that since such indebtedness has been extinguished, they are entitled to the return of the stock.

[15] Respondents have apparently dropped their claim that the contract was unauthorized and prohibited by the express

In considering the question of whether this is, in effect, a suit against the United States to which it has not consented, we are aware that it is not "an easy matter to reconcile all the decisions of the court in this class of cases". *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 451; *Brooks* v. *Dewar*, 313 U. S. 354, 359. We believe, however, that no such reconciliation is here required since, in our view, it is clearly established that this is a suit against the United States by those authorities culminating in the recent decision of this Court in *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, and that *United States* v. *Lee*, 106 U. S. 196, relied on by respondents, is not applicable. We submit that this is true regardless of whether the jurisdictional question is considered in light of the complaint alone or the complaint together with petitioners' affidavits.

Before discussing the jurisdictional question itself, the matter of approach to that question should be mentioned. The lower court adopted the theory that the jurisdictional and substantive questions

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provisions of the Merchant Marine Act of 1936, as amended, and that the contract being unenforceable, no legal rights of either party could be effected under said contracts (R. 6). They now take the position that the Maritime Commission was authorized to take title only for the limited purpose of collateral security on a pledge (R. 121), or, alternatively, that since it is doubtful whether Section 207 of the Merchant Marine Act authorizes the Commission to take title for any broader purposes, the contract should be construed not to go beyond that point and, in this way, avoid the necessity of passing on the question of invalidity (R. 121, Br. in Opp. pp. 9–10).

are so interwoven that it is necessary to determine the merits in order to resolve the jurisdictional issue. But in the most recent decision of this Court on that question, the jurisdictional and substantive issues were treated as being distinct, the Court holding that even if a government officer's justification for withholding property was an unconstitutional statute, a suit brought to prevent such withholding was nevertheless one against the United States. *Mine Safety Appliances Company* v. *Forrestal*, 326 U. S. 371, 374–375. As we shall show, the situation here is indistinguishable.

A. *The complaint together with the affidavits show that the present case is an attempt to try title to stock, to which the United States claims absolute title.*—Petitioner's affidavits present uncontroverted factual materials designed to show that the transfer of title to the stock to the Maritime Commission was intended by the parties to the contract to be absolute (see *supra*, pp. 5–9, 10), and to refute respondents' conclusion that "such transfer was in fact and in legal effect collateral security"[61] (R. 6). But the respondents counter with the suggestion, contrary to petitioner's position (R. 104–106) that under Section 207 of the Merchant Marine Act of 1936, as amended, *supra*, pp. 4–5, the Commission

[61] On motion to dismiss, such allegations, being conclusions of law would, of course, not be admitted as true. *Newport News Co.* v. *Schauffler*, 303 U. S. 54, 57; *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 184–185; *Neirbo* v. *United States*, 294 U. S. 317, 324–325, and cases there cited.

was authorized to take title only as collateral security (R. 121).[17] On the complaint and affidavits, then, the crucial questions in this case are the proper construction of Section 207 and the proper interpretation of the contract pursuant to which the title to the stock here involved was transferred to the United States, that is, whether such transfer could be and was absolute or only a pledge.

In view of the facts that the United States took title to the stock lawfully, now has possession thereof, has at least documentary legal title thereto, and claims an absolute title, respondents' attempt to obtain a judicial solution of these questions would appear to be nothing more than a bald effort to try the sovereign's title and clearly to require the presence of the United States. *Louisiana* v. *Garfield*, 211 U. S. 70, 77; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Oregon* v. *Hitchcock*,

[17] Although authority to acquire absolute title to the stock is not conferred on the Commission in specific language, such authority is encompassed in the over-all provisions contained in Section 207 empowering the Commission to enter into such contracts as may be necessary to carry on its activities. The purposes of the Merchant Marine Act, as stated in Section 101 (*supra*, pp. 3–4) are to foster the development and maintenance of a merchant marine sufficient to carry water-borne commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such commerce. Thus when Section 207 is construed in light of these purposes, the Commission has authority to acquire absolute title to stock, where, as in the present situation, such acquisition was the only way to avert the bankruptcy of an essential shipping company and to continue it in operation. Cf. *United States ex rel TVA* v. *Welch*, 327 U. S. 546, 551.

202 U. S. 60; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Louisiana* v. *Jumel*, 107 U. S. 711; *Stanley* v. *Schwalby*, 162 U. S. 255; *United States ex rel. Goldberg* v. *Daniels*, 231 U. S. 218; *Morrison* v. *Work*, 266 U. S. 481; *United States ex rel. Shoshone Irrigation District* v. *Ickes*, 70 F. 2d 771, certiorari denied, 293 U. S. 571. Further, although the suit was ostensibly brought against petitioners as individuals and not as officials of the Maritime Commission, and neither the Maritime Commission nor the United States has been named as a party, petitioners have no individual interest in the stock involved and claim no individual title or right to possession to the stock; the entire impact of the decree would be solely, and directly, upon the interest, possession, and title of the United States. Hence, the United States is the real party in interest, and the suit is not maintainable without its statutory consent. *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371; *Belknap* v. *Schild*, 161 U. S. 10; *Oregon* v. *Hitchcock, supra; Naganab* v. *Hitchcock, supra; Morrison* v. *Work, supra; United States ex rel. Goldberg* v. *Daniels, supra.*

In *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, a railroad company failed to pay interest upon bonds which the State of Georgia, taking a property lien as security, had endorsed, and at the receiver's sale, the State bought in the property. While the State was in possession of the

property, the holders of a subsequent issue of mortgage bonds issued by the company filed a bill in equity, joining state officers as defendants, to foreclose plaintiff's mortgage and to set aside the sale to the State on the grounds that the State had no constitutional power to make the purchase and that its officers, therefore, were not authorized to bid for the property or to remain in possession thereof. The Court affirmed a decree dismissing the bill for want of jurisdiction, and said (109 U. S. at 457):

> In the case now under consideration the State of Georgia is an indispensable party. It is in fact the only proper defendant in the case. No one sued has any personal interest in the matter or any official authority to grant the relief asked.
>
> No foreclosure suit can be sustained without the State, because she has the legal title to the property, and the purchaser under a foreclosure decree would get no title in the absence of the State. The State is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to the plaintiff in this suit is the interest of the State of Georgia in the property, of which she has both the title and possession.

Similarly, in *Oregon* v. *Hitchcock*, 202 U. S. 60, a suit was brought by the State of Oregon against the Secretary of the Interior and the Commissioner of the General Land Office to enjoin them from patenting to Indians lands within that State, title

to which was claimed by the United States but also claimed by the plaintiff State under certain acts of Congress. The Court, in dismissing the complaint for lack of jurisdiction, followed the rule enunciated in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387 (202 U. S. at 69):

> Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.

Respondents claim that the principles established by the cases above cited are inapplicable. They argue that this is an action *ex delicto* against individual officers of the United States to restrain an unauthorized invasion of respondents' property,

and that "their title antedated the contract, the contract of pledge has served its purpose, has been exhausted and is *functus officio*." (Br. in Opp. p. 13).

But the fact that respondents had title prior to the execution of the contracts is completely irrelevant. The situation at the time the present proceeding was instituted and the one which still prevails is that under the contract here in question, respondents transferred whatever title to the stock they had to the United States which, having at least documentary legal title, claims the right in itself under the contract here involved to retain it. Respondents do not now have either title or possession and the avowed purpose of the present proceeding is to procure the return to respondents of the title and possession with which they have parted.

The contention that this is an action *ex delicto* is likewise inapposite. Similar contentions have been urged upon the courts in practically all the cases referred to above but have never been accepted with respect to suits like this which seek to control the disposition, or to obtain an adjudication as to the ownership, of property claimed by the sovereign and in its possession. *Cunningham* v. *Macon & Brunswick R. R. Co., supra; Morrison* v. *Work; supra; Naganab* v. *Hitchcock; supra; Oregon* v. *Hitchcock, supra; Stanley* v. *Schwalby, supra; United States ex rel. Goldberg* v. *Daniels, supra; Mine Safety Appliances Co.* v. *Forrestal, supra.*

Respondents' position merely begs the question. This is not a case where respondents were the owners in possession of property which petitioners invaded without color of authority. On the contrary, respondents admit that the United States lawfully acquired possession of, and documentary title to, the stock. Respondents can prevail only by obtaining a decree holding that the United States has no title. The question whether the stock should be returned to respondents, is one on which the United States must be heard and, as to which it is the real party in interest.

Accordingly, when the complaint is viewed with the affidavits, it is clear that since the real issue on the merits is related to the title to the stock which the United States holds and claims absolute title to, a court has no jurisdiction to determine that question raised in the absence of the United States. "In short, the government's liability cannot be tried 'behind its back.' *Louisiana* v. *Garfield*, 211 U. S. 70, 78." *Mine Safety Appliances Co.* v. *Forrestal*, *supra*.

B. *The complaint on its face discloses that respondents seek specific performance of a contract with the United States.*—Disregarding the facts established by the affidavits and looking solely to the complaint, it is nevertheless apparent that the present proceeding is a suit against the United States. The complaint alleges that pursuant to contract, the stock here involved was transferred to

the United States as collateral security for a debt now extinguished; that it is held by agents of the United States under a claim of absolute ownership by the United States; and that respondents made demand upon the Maritime Commission for the return of the stock, which request was denied (R. 6–7). The complaint then prays that petitioners be enjoined from selling the stock and that they be ordered "to return the plaintiffs' stock now in the unlawful possession and custody of the defendants, to the plaintiffs, the lawful owners" (R. 8).[18] Respondents, in praying for such relief, are only nominally proceeding against petitioners; actually, they are seeking by indirection to obtain specific performance of the contract against the United States.

That this proceeding is only nominally directed against petitioners as private individuals can be

[18] Respondents refer to the Federal Tort Claims Act (Act of August 2, 1946, Public Law 601, 79th Cong., 2d Sess., Title IV, Sec. 401 et seq.) (Br. in Opp., pp. 15–16, 22) as waiving the sovereign immunity of the United States in regard to certain torts of its employees. Aside from the fact that it is doubtful that the Act covers acts of the character here alleged, it authorizes only money judgments and not the affirmative relief here requested by respondents. Section 410. Moreover, the alleged claim here involved arose before January 1, 1945, the initial accrual date set by the Act. Section 410. In any case, this Act would be pertinent only in a suit against the United States and in no way affect suits against Government officers as individuals. If respondents were seeking a money judgment, recovery would be available in the Court of Claims on a suit against the United States if the contract had in fact been breached. Section 145 of the Judicial Code, 28 U. S. C. 250.

conclusively shown by the fact that the relief sought cannot be obtained through any judgment against Admiral Land and the other petitioners who are no longer connected with the Commission.[19] Admiral Land's sole activities in regard to the stock—the taking of possession and title,[20] the custody and refusal to return to respondents—has been in his official capacity as member of the Commission. Admiral Land is not now in a position either actually to sell the stock himself, or to prevent any officials on the Commission from so disposing of the stock, nor is he able either himself to return the stock or order its return to respondents. Thus any judgment against Admiral Land would be ineffective to secure the relief sought by respondents. Petitioner McKeough is the only one of the originally named defendants who still is a member of the Commission and even he would be unable to comply with such a court order, since the Commission can act only through a majority of its members. Section 201 (a) of the Merchant Marine Act. True, Mr. Mc-

[19] Of the five original defendants, only one—Raymond S. McKeough—is at this time still a member of the Maritime Commission. Admiral Land and Mr. Macauley have resigned. Mr. Carmody's term as member of the Commission expired on September 26, 1946, and Admiral Vickery has died. The discussion, couched in terms of Admiral Land for convenience only, applies to the others as well.

[20] Admiral Land was the only one of the members of the Maritime Commission named as defendants in the present case who held a position within the Commission at the time of this transaction (R. 21-22).

Keough, together with the petitioners who have been added (see *supra*, note 1, p. 1) would be in a position to comply with the order, but that would be only because of their official positions in the Maritime Commission. Any action aimed at giving respondents the requested relief would thus necessarily involve the exercise by these petitioners of the official authority of their position. Hence the suit can be effective only to the extent that it seeks to control petitioners' actions and functions as members of the Maritime Commission.

It is settled law that any action seeking relief against an officer of the sovereign, which relief can be afforded only by such officer acting in his official capacity, is a suit against the sovereign. *Belknap* v. *Schild*, 161 U. S. 10, 25; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296; *Hagood* v. *Southern*, 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457. Moreover, inasmuch as respondents are seeking return of stock the possession of which the United States lawfully acquired, the United States is "the only real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates." *In re Ayers*, 123 U. S. 443, 506; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387. Since the return of stock is allegedly due respondents in accordance with the terms of the contract, the present proceeding is in effect a forbidden suit for specific performance of

a contract with the United States. *Wells* v. *Roper*, 246 U. S. 335; *Belknap* v. *Schild*, 161 U. S. 10, 19; *Hagood* v. *Southern*, 117 U. S. 52; *Louisiana* v. *Jumel*, 107 U. S. 711; *United States ex rel. Goldberg* v. *Daniels*, 231 U. S. 218; *Boeing Air Transport* v. *Farley*, 75 F. 2d 765 (App. D. C.); certiorari denied *sub nom. Pacific Air Transport* v. *Farley*, 294 U. S. 728; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. 2d 288 (C. C. A. 2), certiorari denied, 293 U. S. 603; *United States ex rel. Shoshone Irr. Dist.* v. *Ickes*, 70 F. 2d 771 (App. D. C.), certiorari denied, 293 U. S. 571.

The instant case is no different from the cases where an attempt is made to reach money in the possession of the Government. In those cases this Court has held that the sovereign is the "real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Co.* v. *Department of Treasury*, 323 U. S. 459, 464; *Kennecott Copper Corp.* v. *State Tax Commission*, 327 U. S. 573; see also *Smith* v. *Reeves*, 178 U. S. 436; *Great Northern Ins. Co.* v. *Reed*, 322 U. S. 47; *Lankford* v. *Platte Iron Works*, 235 U. S. 461.

C. United States *v. Lee, relied on by respondents, is inapplicable.*—Respondents have contended (Br. in Opp., pp. 14–15) that the instant case is governed by *United States* v. *Lee*, 106 U. S. 196.[n] That was

[n] The other cases relied on by respondents such as *Tindal* v. *Wesley*, 167 U. S. 204, and *Correa* v. *Barbour*, 71 F. 2d 9 (C. C. A. 1), are in all respects comparable to the *Lee* case and were decided solely upon its authority. They, therefore,

an action in ejectment against officers of the United States as individuals to evict them from possession of plaintiff's lands which they had taken under the color of an invalid tax title held by the United States. In those circumstances, the Court held that the action could be maintained against these officers as individuals without joining the United States. That case, we submit, is inapplicable for at least two reasons.

1. In the *Lee* case, the Court found that the property was taken from plaintiff "by force and violence" (106 U. S. at 219), and without pretense of authority (106 U. S. at 219–222); the facts further disclosed that plaintiff's property had been confiscated, since the claim of title of the United States depended on an unauthorized tax sale following the refusal of the Governments' officers to permit plaintiff to pay taxes after they became due. Therefore, the original taking by defendants was a trespass which had continued throughout their possession and there manifestly was not even a colorable basis for the claim of the United States. That was one of the cases which "hold that a public officer cannot

require no separate discussion. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, and *Ickes* v. *Fox*, 300 U. S. 82, are cited by respondents (Br. in Opp., p. 15) for the same proposition. The proposition for which they actually stand—that an obviously illegal interference on the part of a Government official, with land in the plaintiff's possession, may be enjoined in a suit against the official in his private capacity—neither has, nor is alleged to have, any application to the facts in this case.

justify a trespass against a person's property by invoking the command of an unconstitutional statute. Under such circumstances, the tort becomes the officer's individual responsibility, and the government is not held to have sufficient interest in the controversy to be considered an indispensable party." *Mine Safety Appliances Co.* v. *Forrestal, supra,* at 374. In the instant case, however, petitioner Land is the sole defendant who was a member of the Commission when the stock was originally acquired in 1938 (R. 21-22), and hence if any trespass had occurred at the initial taking, the petitioners here, other than petitioner Land, not having committed it, would, of course, not be liable therefor. Moreover, it is clear that the original taking was not a trespass since it is conceded that the original acquisition of title to the stock by the United States was valid, regardless of the scope of the title then taken, and that the United States rightfully continued in possession at least until 1943. Its continued possession thereafter can hardly be characterized as a "trespass" within the limits of the *Lee* case.

2. Moreover, in the *Lee* case, the action was ejectment, an action which traditionally does not raise or dispute the issue of ownership or title. See Adams, *Ejectment,* p. 351; Freeman, *Judgments* (5th ed., 1925), Sec. 860; 3 Blackstone, *Commentaries,* pp. 200–207. The Court in that case carefully emphasized that the suit was for possession

only (106 U. S. at 210, 219) and that the interest of the United States in the title would in no way be bound or affected by the decree (106 U. S. 217, 222). Thus there was not involved, as there is here, any claim of title as against the United States, and a decree granting the plaintiff possession—the relief which it sought—could be, and was, entered without disturbing or adjudicating the claim of ownership of the United States. Here, possession and title are for all practical purposes inseparable; delivery of possession of the stock, when endorsed in blank as in the case of the original delivery to the United States, would transfer title to respondents. Uniform Stock Transfer Law, Section 1. If not so endorsed, the stock would be of no use to respondents.

The limited applicability of the *Lee* case has consistently been recognized by this Court. See opinion of Mr. Justice Miller, who had written the majority opinion in the *Lee* case in *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 452. See also *Stanley* v. *Schwalby*, 147 U. S. 508, 518–519. On the second hearing of *Stanley* v. *Schwalby*, 162 U. S. 255, 271–272, this Court approved the *Lee* case on the ground that the action of ejectment under Virginia law there involved did not try title; it held that where, as in Texas, an action of trespass to try title put in issue the title claimed by the United States, the United States was an indispensable party. Similar considerations make the *Lee* case totally inapplicable here.

D. *The United States Maritime Commission, an agency of the United States, is not subject to suit.*—As "another facet of the jurisdictional question which buttresses our conclusion to reject the defendant's claim of immunity at this time" (R. 168), the lower court found a waiver of sovereign immunity from the authority vested in the Maritime Commission by Section 207 of the Merchant Marine Act of 1936, as amended (*supra*, pp. 4–5) to perform certain functions "in the same manner that a private corporation may contract." It is not clear whether this finding was intended merely to support the lower court's previous adoption of respondents' theory that the present proceeding was *ex delicto* against the members of the Maritime Commission as individuals, or to provide an independent alternative ground for jurisdiction in the district court.

If intended merely to support the court's earlier conclusion, that this was a suit against private individuals, such a finding is obviously irrelevant, since in the absence of an attempt to sue the Maritime Commission, it is immaterial whether that Commission is suable. On the other hand, if this finding is intended as an alternative holding, the lower court, in order to give content to such holding, must also hold that the present proceeding is, in effect, a suit against the Maritime Commission. Such a holding would be irreconcilable with respondents' theory that this is a suit against private individuals—a factor which has led respondents to

characterize this portion of the opinion of the court below as "reflections" (Br. in Opp., p. 22).

In any event, the finding of a waiver of immunity is improper. The Maritime Commission is an agency of the United States, and as such is, of course, immune from suits in the absence of a waiver. There has been no express waiver of sovereign immunity of the Maritime Commission except in certain instances not here relevant, arising under Section 2 of the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. 742).

Nor may a waiver properly be implied. Every authorized activity of the United States is an exercise of governmental power (*Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95), and, except where Congress has waived it, federal immunity is coextensive with the entire scope of federal powers. The broad authority to contract, granted the Commission by Section 207, was deemed necessary in view of the complex business transactions contemplated for that agency by the Act which created it. To read into the provisions of Section 207 a waiver of immunity disregards a long line of decisions of this Court which prohibit such relinquishment of a sovereign immunity by implication. *United States* v. *Sherwood*, 312 U. S. 584, 590; *United States* v. *Michel*, 282 U. S. 656; *Price* v. *United States*, 174 U. S. 373; *Shillinger* v. *United States*, 155 U. S. 163; cf. *United States* v. *Shaw*,

309 U. S. 495; *United States* v. *United States Fidelity Co.*, 309 U. S. 506.

CONCLUSION

For the reasons stated, it is respectively submitted that the judgment below is erroneous and should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 207

EMORY S. LAND (Chairman, United States Maritime Commission), HOWARD L. VICKERY (Vice Chairman, United States Maritime Commission), et al.,

Petitioners,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR, PACIFIC STATES COMPANY, et al.,

Respondents.

Respondents' Memorandum Relative to Petitioners' Motions to Substitute Defendants, Consenting in Part and Objecting in Part

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Respondents.

Respondents' Memorandum Relative to Petitioners' Motions to Substitute Defendants, Consenting in Part and Objecting in Part

Upon filing their petition for a writ of certiorari the petitioners (defendants) also filed a motion to substitute W. W. Smith, present Chairman of the United States Maritime Commission, as defendant in place of defendant Land, former Chairman, who resigned from the Commission January 15, 1946, and to substitute Richard Parkhurst, a present member of the Commission, for defendant Howard L. Vickery, who died

March 21, 1946. On July 17, 1946, the petitioners filed a "Further Motion to Substitute," asking that Grenville Mellen, another new member of the Commission, be substituted for defendant Edward Macauley, who resigned from the Commission May 21, 1946.

So far as petitioners seek to substitute Richard Parkhurst for Howard L. Vickery, the respondents consent, since Vickery is now deceased, and respondents have no desire to pursue his estate.

So far as the petitioners seek to add W. W. Smith and Grenville Mellen as defendants, the respondents consent.

But so far as petitioners seek to eliminate defendants Land and Macauley as parties to the suit, the respondents object.

A motion by a plaintiff to substitute defendants is not uncommon. But a motion by a defendant to substitute another party in his place is extraordinary. This is an action against the defendants individually for commission of a tort to the damage and injury of the plaintiffs (see brief of respondents filed concurrently herewith in opposition to the petition for writ of certiorari, at p. 12). The relief to which the plaintiffs are entitled may include judgment for damages against the defendants. At a time when each of the defendants was a member of the Commission and had custody of plaintiffs' property, he refused to surrender the property on demand and thereby became guilty of conversion, and the fact that one has thereafter ceased to be a member of the Commission does not exonerate him from his personal liability for that wrong.

A defendant called on by proper process to answer a charge of wrongdoing may not cavalierly avoid answering by substituting in his place another as a sacrificial lamb. The personal liability of defendants Land and Macauley as individuals cannot be shifted to Smith and Mellen without the plaintiffs' consent. *Ex Parte La Prade*, 289 U.S. 444; *Gorham Manufacturing Co. v. Wendell*, 261 U.S. 1. It is immaterial that the parties sought to be brought in are themselves wrongdoers.

Moreover, the plaintiffs are entitled to take advantage of the fact that Land and Macauley are defendants by requiring them to answer interrogatories under Rule 33 of the *Rules of Civil Procedure* and to make admissions under Rule 36, and by taking their depositions and placing them on the witness stand as adverse parties under Rules 26(d) and 43(d).

W. W. Smith, Richard Parkhurst and Grenville Mellen, present members of the Commission, have made themselves liable to the plaintiffs and have committed wrongs identical with those charged in the complaint against the defendants, because they now have custody of the property claimed by the plaintiffs and refuse to surrender. By seeking substitution as defendants they admit their refusal to deliver and they adopt the attitude, and continue and threaten to continue the action, of their predecessors. They have therefore themselves become liable in their own capacity and may properly be made parties by addition. For that reason we consent that they be added as defendants, but we do object to the elimination of defendants Land and Macauley.

Respectfully submitted,

August 29, 1946.

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Respondents.

Brief of R. Stanley Dollar, Dollar Steamship Line, The J. Harold Dollar Estates Company, and H. M. Lorber in Opposition to Petition for Writ of Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 207

EMORY S. LAND (Chairman, United States Maritime Commission), HOWARD L. VICKERY (Vice Chairman, United States Maritime Commission), et al.,

Petitioners,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR ESTATES COMPANY, et al.,

Respondents.

Brief of R. Stanley Dollar, Dollar Steamship Line, The J. Harold Dollar Estates Company, and H. M. Lorber in Opposition to Petition for Writ of Certiorari

We respectfully submit that the case does not present any of the questions stated in the petition.

Furthermore, although this Court has said that except in extraordinary cases it does not issue a writ to review a decision that merely remands the cause for further proceedings and trial and is therefore not final (*Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251; *Robertson and Kirkham, Jurisdiction*

of the Supreme Court of the United States, Section 308, p. 623), the petitioners are seeking a writ to review a decision of just that character.

Moreover, the grounds assigned by petitioners are that the questions supposedly presented are of "general importance." Those questions pertain to whether the action is one against the United States and therefore, so it is claimed, not maintainable without the consent of the sovereign. Even assuming that the questions once had general importance, since August 2, 1946, that is no longer so. On that day Public Law 601—79th Congress, known as the *"Legislative Reorganization Act of 1946,"* took effect. Title IV, known as the *"Federal Tort Claims Act"* (Secs. 401-424), waives immunity from suit in tort claims and provides for suit and judgment against the United States for money on account of damage to or loss of property or personal injuries caused by negligent or wrongful act or omission of any employee of the United States, officer or employee of any federal agency, acting within the scope of his office. The United States is declared to be liable to the same extent and in the same manner as private individuals. Since the sovereign has thus waived immunity in all cases arising after January 1, 1945, the extent of immunity before the passage of the statute is not a question of general importance.

STATEMENT

This action was begun in the District Court for the District of Columbia, which had jurisdiction under 18 D. C. Code, Sec. 41 as amended, 49 Stat. 1921 (cf. *Stark v. Wickard,* 321 U.S. 288), because defendants are residents of the District of Columbia. The present respondents were the plaintiffs in the District Court, and petitioners were the defendants.

The District Court dismissed the complaint, with prejudice, of its own motion (R. 79). At the time it took this action the only pleading on file was the complaint. Issue had not yet been joined, no motions had been made by defendants, and

the case was merely before the court on the plaintiffs' motion for a temporary injunction.

The only papers filed in the District Court by defendants prior to the dismissal were certain *ex parte* affidavits, and these had been presented only in opposition to the application for temporary injunction (so recited in the Judgment, R. 79). Certain portions of petitioners' statement of facts (pages 5, 6, 7, and first half of page 8) are predicated on one of these affidavits and are no proper part of the record upon which the case on appeal is to be decided.[1]

The District Court wrote no opinion. Disposing of the matter on the complaint alone, it made no findings. From its judgment of dismissal (R. 79) the plaintiffs appealed (R. 81), designating under Rule 75(d) of the *Rules of Civil Procedure* only one point on which they intended to rely on appeal, namely, that "The Court erred in dismissing plaintiffs' complaint" (R. 81). The Court of Appeals reversed and ordered the cause remanded, so that issue might be joined and the case determined on its merits (R. 171, 172).

Only two questions could conceivably be present in judging whether a District Court erred in dismissing any complaint as it did here: (1) Does the complaint state a claim for relief? and (2) does it state a case within the jurisdiction of the court?

Whether the complaint states a claim for relief may only be determined by reference to the complaint and acceptance of its allegations as true. Assertions and elaborations in affidavits objecting to the motion for temporary injunction may not be considered, "as these affidavits are a part of the record only for the purpose of determining the propriety of a temporary injunction." *Gibbs v. Buck*, 307 U.S. 66, 76; *Polk Company v.*

[1]The plaintiffs, as appellants, designated for the record on appeal only the complaint, judgment, and appeal papers (R. 159). The defendants, as appellees, required inclusion of the affidavits by counter designation (R. 160).

Glover, 305 U.S. 5, 8. Therefore the assertions on pages 5 to the middle of page 8 of the petition are improper. No motion for summary judgment was made, or, if it had been made, could properly have been granted (see p. 18, infra). Moreover, the question was not merely whether the complaint was deficient as a matter of pleading but whether it revealed that a cause of action could not be established under any state of facts which might by any possibility be proved in support of the claim. Otherwise a motion to dismiss does not lie.[2] *A fortiori*, where there was no motion to dismiss, no deficiencies in pleading were pointed out, and there was no opportunity to amend, dismissal for failure to state a claim was error.

The Court of Appeals held that the complaint does state a claim for relief against the defendants. Significantly, the petition does not contend otherwise. In short, petitioners now concede that a claim for relief is stated, and this concession strips any traces of merit from their jurisdictional contention.

Their jurisdictional contention is confined to a claim that the action is a suit against the United States. Apart from this, no doubt of jurisdiction exists (see page 2, supra). This "jurisdictional question," so raised by petitioners, is a spurious one. If the plaintiffs prove their cause of action, i.e., substantiate the allegations of their complaint, then the suit is not one against the United States. Conversely, if they fail to establish their allegations, their cause must be dismissed on the merits with no reference to jurisdiction.

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[2] *Atwood v. National Bank of Lima*, 115 Fed.2d 861 (6 Cir.); *Tahir Erk v. Glenn L. Martin Co.*, 116 Fed.2d 865 (4 Cir.); *Leimer v. State Mutual Life Assurance Co.*, 108 Fed.2d 302 (8 Cir.).

Rule 15 of the *Rules of Civil Procedure* provides that a party may amend as of course at any time before a responsive pleading is filed. Since defendants here filed no pleading, the liberal rules of pleading were summarily defeated by the District Court.

Plaintiffs did not sue the United States. The action was brought against five individuals who were members of the United States Maritime Commission at the time the complaint was filed. It was brought to recover personal property consisting of shares of stock of American President Lines, Ltd., a private corporation, and the certificates representing the shares. It is alleged that plaintiffs are the owners and have been since before 1938, that in 1938 the corporation was indebted to the United States Maritime Commission for a large sum of money (R. 6, Complaint, para. 30), that plaintiffs then pledged the shares to the Commission as collateral to secure the debt of the corporation (R. 6, Complaint, para. 29, 30), that thereafter and before the complaint was filed the debt was paid in full, and that defendants, who thus acquired possession, refuse to surrender the shares and threaten to sell them to others (R. 6, 7, Complaint, para. 33, 34). It is alleged that in August 1938 the plaintiff stockholders endorsed their certificates in blank and delivered them to the Commission under a written contract dated August 15, 1938, a copy of which is attached to the complaint as Exhibit A (R. 8).

The issue upon trial of this case will be the nature and effect of that contract. The respondents claim, and alleged in their complaint, that the contract created only a pledge as security for the indebtedness. The petitioners contend that it transferred title outright. They repeatedly assert in their petition[3] that the "United States" claims title to the stock and that the complaint alleges possession of the stock by petitioners "under a claim of absolute ownership by the United States." The petitioners thereby beg the issue. The United States has not claimed title or ownership. The claim that the United States has title is made by the individual petitioners as their defense against plaintiffs' charge of tortious violation of plaintiffs' ownership and right of present possession. The allegation of the complaint is not that the United States claims title but that (R. 6, para. 29):

[3] E.g., on page 3 in "Questions" 1 and 2, and on pages 9 and 16.

"although such transfer was in fact and in legal effect collateral security for the indebtedness of the company to the United States Maritime Commission, nevertheless after the satisfaction of all of said debts and obligations to the United States, *the defendants have asserted and claimed,* and do now assert and claim that the United States is the lawful owners of the shares of stock so transferred by the plaintiffs to the United States Maritime Commission."

ARGUMENT

A preliminary, though summary, discussion of respondents' claim on the merits is desirable for an understanding of the alleged jurisdictional question.

A.

THE COMPLAINT STATES A CLAIM FOR RELIEF AGAINST THE INDIVIDUAL DEFENDANTS

In passing on the ultimate issue whether the contract worked a pledge or an outright transfer of title, two different questions are presented, one a pure question of law and the other a question of mingled law and fact:

1. Had authority been conferred by law on the Maritime Commission to acquire title to the stock of a private corporation, outright, or was not its power limited to the acquisition of stock as collateral to secure a debt?

2. Assuming that the Commission had the power to acquire an outright title, nevertheless, what is the proper construction of this contract and this transaction?

The complaint raises both issues, the first in paragraphs 25, 31, 32 (R. 5, 6) and the second in paragraphs 29, 30 (R. 6). These are not inconsistent but independent claims, each leading to the same conclusion.

On the purely legal question, it is plain that the Commission could not and therefore did not acquire on behalf of the United

States more than the law empowered it to acquire, and that if Congress never conferred upon the Commission power to acquire title outright, any defendant now withholding possession from the owner would be acting outside of the authority conferred by law, could not defend his acts by invoking title or immunity of the United States, and would be guilty of a personal tort and subject to answer to the respondents.

Respondents' contention on this question is based on Section 207 of the *Merchant Marine Act of 1936*, 49 Stats. 1988, as amended (46 U.S.C. 1117), which is quoted in the complaint (R. 5) and partially in the petition (at p. 4). Although greatly discussed by all counsel and the court in oral argument, the Court of Appeals expressed no views on this subject in its opinion (R. 162-170) but based its decision on the second ground. We therefore do not now discuss the subject further. If, eventually, it is decided that the Commission had no authority to take outright title to corporate stock, respondents' right to a judgment automatically will follow. If the contrary is decided, it will become necessary to decide the second issue, that of mingled law and fact.

On this second issue, respondents' claim rests upon:

(1) Certain facts, and (2) certain legal principles. Some of the facts are:

(a) The contract does not state that it is an outright transfer and is wholly consistent with being a security transaction.

(b) On its face the contract contains the strongest evidence that it was only a security transaction.[4]

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[4]The Court of Appeals noted in its Opinion (R. 166; 154 Fed.2d 307, 309, 310):

> "As appellants argue, the terms of the contract seem in some respects to be more consonant with the theory of pledge than that of outright transfer. For example, it was specifically provided that appellees should acquire some 90% of the voting control of the company and have the power to sell the securities acquired. Neither of these

(c) Evidence dehors the face of the instrument demonstrates it to be a security transaction.[4]

Some of the legal principles are:

(a) Even if a contract appears on its face to be an absolute transfer, it may be deemed a mortgage or transfer as security, and evidence dehors the instrument may always be admitted.[5]

(b) In referring to the "real intention" or "real transaction" of the parties, the courts do not and may not limit themselves to any conscious or verbally expressed state of mind but allude to the essential nature of the transaction in the light of equitable principles. Thus they consider whether the debt continue to remain after the transfer,[6] as it did here, the contract expressly providing that it should remain (Para. 14, R. 13, 14). They apply the principle that once a debtor-creditor relationship ex-

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[5]*Cabrera v. American Colonial Bank*, 214 U.S. 224; 4 *Pomeroy's Equity Jurisprudence* (5th ed.), p. 583, Note 16.

[6]4 *Pomeroy's Equity Jurisprudence* (5th ed.), p. 583.

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conditions would appear necessary if the transfer was intended to be absolute. Further, some of the language used in the Commission's press release of July 6, 1943, tends to illustrate the genuineness of the 'claim' which appellants are asserting. In announcing that it was considering the 'possibility of bringing about private ownership of the American President Lines' the Commission's release said: 'Some of the debts of the Company were covered by debentures and preferred stock, and the Maritime Commission, *to protect its interests* and insure continuation of service, *came into possession* of 80 per cent of the common stock. Although the Commission had full voting control, it caused the Company to be operated by a Board of Directors which included representative local interests of San Francisco and former creditors of the concern.' (Italics added.) It would thus appear that perhaps the 'possession' acquired by the Commission to protect its 'interests' was, as appellants urge, nothing more than a bargain by which there was a substitution of collateral resulting in strengthening the Commission's position by reason of the management control inextricably bound to the transferred stock. We have no finding or conclusion from the trial court on this basic issue which we believe must be tried." [Italics are the court's]

ists, then, no matter what form the transaction or relation between the parties assumes, it remains in equity that of debtor and creditor. Conveyances by debtor to creditor are deemed to have been for purposes of security only, and when the debt is paid the property is to be restored. The equity of redemption is jealously protected, and the presumption may be overcome only by strong proof by the creditor. Where the creditor is in a position of strength and the debtor in a position of weakness, equity is particularly insistent that the original character of the relationship of the parties be not converted into a forfeiture of the debtor's title. The rules are especially applied where the record displays the application of pressure upon the debtor by the creditor.[7] All these circumstances are sufficiently delineated in the complaint.

Unless the transaction was a mere substitution of collateral, the harsh injustice is worked that the creditor has been paid its debt in full and yet remains the owner of 92% of the capital stock of the debtor which it received only because of the debt, all to the utter deprivation of the former owners. That construction works a forfeiture, and therefore is to be avoided unless no other is possible.[8]

(c) If there is doubt of the validity of a transaction, construed as an outright transfer of title, and it may be construed as a security transaction, it must be so construed, for a con-

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[7] 3 *Williston on Contracts* (Rev. ed.), Sec. 771, pp. 2171, et seq.; 4 *Pomeroy's Equity Jurisprudence* (5th ed.), Sec. 1193, pp. 568, 570; *Peugh v. Davis*, 96 U.S. 332; *Russell v. Southard*, 12 How. (U.S.) 138; *Conway v. Alexander*, 7 Cranch (U.S.) 218; *Villa v. Rodriguez*, 12 Wall. (U.S.) 323. As the contract here was made and executed in California, we also cite *Pierce v. Robinson*, 13 Cal. 116, 125; *Hickox v. Lowe*, 10 Cal. 197; *Hodgkins v. Wright*, 127 Cal. 688; *Montgomery v. Spect*, 55 Cal. 352 at 354; *Clarke v. Fast*, 128 Cal. 422, 61 Pac. 72.

[8] 3 *Williston on Contracts* (Rev. ed.), pp. 1786, 1787; *Ballard v. MacCallum*, 15 Cal.2d 439, 444; 101 Pac.2d 692.

struction that avoids invalidity or the necessity of passing on the question of invalidity thereof is always preferred.[9] The Comptroller General of the United States in his Annual Report to Congress for the fiscal year ending June 30, 1940 reported to Congress of this very transaction that the Commission's claimed acquisition of title was "under doubtful authority, to say the least." And General Counsel for the Maritime Commission, in an opinion rendered to it and appearing at page 108 of its Special Report to Congress, dated April 10, 1939, copy of which is Exhibit A-2 to the affidavit of Admiral Land (cf. R. 173), stated "that a careful study of the Merchant Marine Act of 1936 does not reveal that the Congress contemplated the type of government operation involved in the proposed transaction."

(d) The contract on its face, as well as extrinsic evidence (cf. footnote 4, supra), shows that the Commissioners were concerned with obtaining voting control so that they might control the management of the debtor in order to protect the obligation owing to the Commission and its security. A pledge would give the Commission all the protection it needed. The Commissioners' dominating motive was to control the management, and it is elementary that contracts are to be construed in the light of the main purpose or object.[10]

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[9] *Brierley v. Commercial Credit Co.*, 43 Fed.2d 724; cer. den. 282 U.S. 897; *Great Northern Railway Co. v. Delmar Co.*, 283 U.S. 686; *California Civil Code*, Sec. 3541; *Robbins v. Pacific Eastern Corporation*, 8 Cal.2d 241, 272; 65 Pac.2d 42, 58.

[10] 3 *Williston on Contracts* (Rev. ed.), Sec. 619, pp. 1781, 1782.

B.

THE SUIT IS NOT ONE AGAINST THE UNITED STATES, AND NO JURISDICTIONAL QUESTION IS PRESENTED.

This is not a suit against the United States but against certain individuals who, at the time the suit was commenced, had possession of property claimed by respondents to belong to them and withheld it from respondents despite demand.

No judgment against the United States is sought. No decision in the case will be *res judicata* with respect to the title of the United States, but only with respect to the rights of the parties *inter se*. Of course, if the United States were to become an actor in asserting a claim—i.e., a plaintiff or an intervenor, respondents would have their day in court. By raising the spurious jurisdictional question petitioners are actually seeking to deprive respondents of a day in court.

The fundamental starting point of the case is that respondents' rights are proprietary and not contractual in origin. In other words, respondents admittedly had title, that title was not derived from the United States and rested on no contract with the United States, and *they still have title unless petitioners establish that they lost it.* The only transaction by which it is claimed that the title was lost is the 1938 contract. Since the allegations of the complaint must be accepted at this stage, it must be taken that the 1938 transaction was only a pledge. Then, the debt having been paid, the lien was discharged by operation of law, and respondents, the owners, were entitled to the return of the possession by petitioners, the individuals who then had custody of the shares. The petitioners argue that an action to recover the shares is in effect a suit or specific enforcement of a contract of the United States to return the shares when the debt was paid. The argument ignores hornbook law. The right of the owner of pledged property to its return upon discharge of the debt does not originate in contract. An action

to vindicate those rights is not contractual; it was not at common law an action in assumpsit or debt but sounded in tort, being an action in replevin, or trover and conversion, or trespass. One who unlawfully retains possession, after the right to hold possession has ceased because the debt is paid, is guilty of a tort, of a common law conversion, is personally liable in damages to the owners, and may be compelled to return the property to the owners and those entitled to its possession. This is true also of anyone who, though lawfully gaining possession on his own behalf or as servant or agent of another, refuses to surrender on demand to him who is entitled to it, or who attempts to transfer to others (as the complaint alleges of defendants), or who, being in possession, denies the owners' title, as here. *Restatement of the Law of Torts*, Vol. 1, Sec. 237; *Restatement of the Law of Security*, Sec. 37.

Petitioners, arguing that the action is in the nature of a suit for specific performance, cite such cases as *Transcontinental & Western Air v. Farley*, 71 Fed.2d 288; *Wells v. Roper*, 246 U.S. 335; *Mine Safety Co. v. Forrestal*, 326 U.S. 371; *Boeing Air Transport v. Farley*, 75 Fed.2d 765; *Shoshone Irr. Dist. v. Ickes*, 70 Fed.2d 771; *Goldberg v. Daniels*, 231 U.S. 218, and *Hagood v. Southern*, 117 U.S. 52. In each of these cases plaintiffs had no rights except as they were created by and arose out of a contract with the United States. Upon breach or alleged breach of the contract by the United States, plaintiffs sued to enjoin the United States official from violating it, which was tantamount to an attempt to obtain specific enforcement by the United States or to collect a debt from it where the contract was for the payment of money, or plaintiff filed suit of similar character. In those cases, too, if plaintiffs had a case, they could seek relief in the Court of Claims, whereas in the present case the cause of action rests on a tort.

Petitioners also cite such cases as *Oregon v. Hitchcock*, 202 U.S. 60; *Minnesota v. Hitchcock*, 185 U.S. 373; *Louisiana v.*

Garfield, 211 U.S. 70; and *Morrison v. Work*, 266 U.S. 481. But those were cases where the title to land had been and was admittedly in the United States and where plaintiff sought to compel conveyance, claiming right to receive title under an act of Congress.[11] Nor is the present case a suit seeking interference with administrative discretion or performance of public duties under the law, such as fiscal duties, as was *Louisiana v. Jumel*, 107 U.S. 711, or with property admittedly that of the United States, as was *Belknap v. Schild*, 161 U.S. 10.

Here respondents claim no title under any law granting government property to them and rest no title on a contract with the United States. Their title antedated the contract, the contract of pledge has served its purpose, has been exhausted and is *functus officio*. The contract is invoked only as a basis of defense by the individual defendants and can serve as such only if construed as they would construe it.

One sued for trespass to, or conversion of, another's property may defend himself by establishing that title and right to possession belong to someone other than plaintiff. The issue of jurisdiction in this case is thus seen to be a spurious one. In order to prevail on the merits—to make out a successful defense—the petitioners seek to establish that the United States has title. If they establish that fact, the respondents lose their cause—not because of lack of jurisdiction, but because they have failed to establish their case on the merits. Conversely, if petitioners do not establish their defense, respondents are entitled to a judgment against them, for then—a necessary deduction from the premise—the suit is not one against the United States

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[11] Thus in *Oregon v. Hitchcock*, supra, it was said (p. 70):

> "Again, it must be noticed that the legal title to all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed. * * * Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States."

at all but against individuals acting without authority or defense under any law.

The instant case falls directly within the authority of *United States v. Lee*, 106 U.S. 196, the leading case on the subject and one which has been recognized in numerous decisions. The facts of that case are in every material respect the same as here. The suit was one to recover possession of property which had been in the possession of officers of the government for more than ten years. The defendants pleaded sovereign immunity, claiming that the property was property of the United States conveyed to it by a certificate of sale of a Tax Commissioner acting under public statute; in this case petitioners claim title under the terms of an agreement. The issue there was the validity of the tax sale. Here it is the effect of the 1938 contract. This Court rejected the attempt of the defendants in the *Lee* case to oust the court's jurisdiction and established the principle that an action against government officials as individuals is not converted into an action against the United States by their assertion that they have the right and authority under the law to take or hold title for the United States. They must prove their authority; if they prove it, they establish their defense on the merits, but the jurisdiction of the court to decide the merits is unimpaired.

The petition asserts in footnote 12 that the *Lee* case is inapplicable because a judgment against petitioners in their individual capacities would not give respondents the relief they ask. The assertion is mistaken. In the *Lee* case the plaintiffs recovered possession of the land and the individual defendants were ordered to surrender it, although plaintiffs' title was not quieted against the United States (cf. 106 U.S. 196 at 197, 221, 222). Precisely the same relief may be granted here.

If the law were otherwise, officers would be free to seize and hold property at will, citizens leasing or chartering property to the government for a term would be unable to gain a

hearing in court if officials in possession refused to surrender at the expiration of the term, and in general citizens would be helpless against irresponsible officials. The law is clear that this is not so. It has been repeatedly held that agents of the government who claim to act for the sovereign in the possession of property must establish its title or right to possession. *United States v. Lee*, supra; *Cunningham v. Macon & B. R. Co.*, 109 U.S. 446, 452.[12] As stated in *Correa v. Barbour*, 71 Fed.2d 9, 12:

> "It is true that the defendant cannot prove that he was in possession under lawful authority without showing that the United States had good title to the land giving it authority to authorize him to enter and possess the land. But in establishing his authority, the right and title of the United States is not at issue in the suit, but is a mere matter of evidence going to prove the character of the authority under which he holds possession . . ."

So also, *Tindal v. Wesley*, 167 U.S. 204; *Ickes v. Fox*, 300 U.S 82; *Morrison v. Work*, 266 U.S. 481; *Philadelphia Co. v. Stimson*, 223 U.S. 605.

In an enlightening discussion of the subject of sovereign immunity from suit, this Court in *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381, showed that the legislative policy of Congress is in the direction of limiting, not of extending, that immunity, and that the present climate of opinion has brought government immunity into disfavor. So also, *Cherry Cotton Mills v. United States*, 326 U.S. ....., 90 L.Ed. (Adv. Op.) 704, 706. By the *Federal Tort Claims*

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[12]In the *Cunningham* case, this Court, in following the *Lee* case, said:

> "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.
>
> "In these cases he is not sued as, or because he is, an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." [Italics are the court's].

Act, enacted August 2, 1946, the United States has waived immunity from suit in tort cases (Public Law 601—79th Congress, Title IV, Sec. 401, et seq.). The Report to the House on this Act by the Joint Committee on the Organization of Congress stated (p. 35) "the Government should be put in the same position as any private party," and quoted (at pp. 35, 36) from a previous House Committee report (H. Rept. No. 1287, 79th Cong., 1st sess.):

> "For many years the present system has been subjected to criticism . . . and as being unjust to the claimants, in that it does not accord to injured parties a recovery as a matter of right . . .
>
> * * * * * * *
>
> "As a result of the statutes briefly summarized above, the Government is subject to suit in contract, on admiralty and maritime torts, and for patent infringement. On the other hand, no action may be maintained against the Government in respect to any common-law tort. The existing exemption in respect to common-law torts appears incongruous. Its only justification seems to be historical."

It is in this climate of opinion that petitioners seek to attach immunity to a suit of a character in which ever since the *Lee* decision over 60 years ago it has been settled that there is no immunity.

Impropriety of a Summary Disposition of the Issue by the District Court

The effect of the argument made by petitioners below was that they can deprive the court of jurisdiction to determine the propriety of their conduct by the bare assertion by them of title in the United States. That argument being thus clearly unsound, their petition recedes somewhat from it and now urges that on the so-called "jurisdictional issue" the court may make a summary disposition by trying the question on *ex parte* affidavits. But since the so-called jurisdictional question is identically the same as the merits of the case, petitioners' request is quixotic

because it asks the court to dispose of the merits summarily on affidavits, under the disguise of jurisdiction, *for the purpose of denying the plaintiffs a full trial on the merits in the usual manner of the law; in short, in order to deny to plaintiffs the full opportunity to prove their right to prevail on the merits.*[13]

On this type of "jurisdictional question," if it can be so denominated, the request is improper because the court is "obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents might be able to prove" the allegations of their complaint. *Ickes v. Fox,* 300 U.S. 82, 96. They are deemed established for purposes of jurisdiction until opportunity is had to prove them at the trial.

Moreover, the affidavits on which petitioners now rely were filed only for the purpose of opposing plaintiffs' motion for an interlocutory injunction and are available only in that connection (*Gibbs v. Buck,* 307 U.S. 66; *Polk Company v. Glover,* 305 U.S. 5, 8). Respondents were never apprised in the District Court that they were called on to respond to the affidavits in any other connection. There was no motion for a summary judgment and no speaking motion to dismiss.[14] Petitioners made *no* motions at all.

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[13] We observe in footnote 8 on page 12 of the petition a curious inversion of regular procedure in the statement:

> "Since the court below settled the jurisdictional defense adversely to petitioners, further proceedings in the district court would necessarily consist of a formal trial to establish facts already of record."

Facts are to be established by trial; trials may not be avoided by prejudging facts. Plaintiffs are entitled to a trial to introduce their evidence in an orderly way. Cf. *Myers v. Bethlehem Corp.,* 303 U.S. 41, at 51, 52: "Lawsuits also often prove to have been groundless, but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

[14] A speaking motion is treated by the courts which recognize its use as governed by the same principles as a motion for summary judgment. Cf. cases cited in 1 *Moore's Federal Practice,* 1945 Supp., pp. 260-264. The Second Preliminary Draft of Amendments to Rules of Civil Procedure (in proposed Rule 12b) specifically would permit speaking motions but states that they are to be treated as motions for summary judgment.

Obviously, too, the District Court could not on its own motion make a disposition of the case which it could not make on a motion for summary judgment. And the present case is not one in which a summary judgment on the merits could be granted to petitioners. Such a judgment may be granted only if it appears that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rules of Civil Procedure*, Rule 56, Subd. (c). On a motion for summary judgment the court may only decide whether there is an issue—it may not decide the issue (see 3 *Moore's Federal Practice*, p. 3184, and the numerous cases cited in the 1945 Pocket Supplement at pages 177-180). Such a motion may not be perverted to the trial of disputed questions of fact upon affidavits; it is no substitute for existing methods of trials of issues of fact. It can only be granted upon evidence which a jury would not be permitted to disbelieve in a jury case and which would require a directed verdict. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620; *Arenas v. United States*, 322 U.S. 419; *Ryan v. Broderick*, 59 F. Supp. 189; 3 *Moore's Federal Practice*, p. 3184; *Walsh v. Walsh*, 18 Cal.2d 439, 444, 116 Pac.2d 62; *Gravenhorst v. Zimmerman*, 236 N.Y. 22, 139 N.E. 766, 772. And an affidavit is not proof contradictory to well pleaded facts in a complaint. *Farrall v. District of Columbia Amateur Athletic Union*, 153 Fed.2d 647. It follows that, where a case involves the construction of a contract and a determination of its nature and effect, a summary judgment is improper where extrinsic evidence is admissible to assist in the construction. And it has so been held. *Walsh v. Walsh*, supra; *Gibson v. De La Salle Institute*, 66 C.A. 2d 609, 152 Pac.2d 774.

These principles are not avoided by calling the issue a "question of jurisdiction." On this subject petitioners cite cases where the jurisdictional question was one of citizenship or the amount in controversy, but even the principles applicable to those questions do not support petitioners. Upon the authority

of those cases, petitioners argue that the burden of supporting jurisdiction of a federal court rests on the plaintiff. But plaintiffs (respondents) at this juncture ask only for a trial at which they will have the opportunity to support whatever burden of proof may rest upon them.

Upon those cases petitioners also urge that the jurisdictional inquiry may precede a trial on the merits and that the court may of its own motion require the jurisdictional facts to be established by evidence. But, where preliminary jurisdictional inquiry shows that the question is identical with the merits, a plaintiff is entitled to introduce his evidence at a proper trial and not to be relegated to a contest of *ex parte* affidavits. It is beside the point to cite cases where the very facts alleged in the complaint negative jurisdiction (e.g., *Oregon v. Hitchcock*, 202 U.S. 60; *Transcontinental & Western Air v. Farley*, 71 Fed.2d 288; *Myers v. Bethlehem Corp.*, 303 U.S. 41), or cases where, the action having gone to trial and judgment, there was no evidence and no finding to sustain the traversed jurisdictional allegations of the complaint (e.g., *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178). It is also beside the point to cite cases holding that a defendant before answer may by motion traverse the allegations of jurisdiction and place plaintiff on proof (e.g., *KVOS, Inc. v. Associated Press*, 299 U.S. 269), for petitioners made no motion. Even where the court of its own motion causes jurisdictional inquiry to be made, it must do so "either by having the proper issue joined and tried, or by some other form of appropriate proceeding" (*Wetmore v. Rymer*, 169 U.S. 115, 122). The plaintiff must be apprised that he is called on to give evidence; here plaintiffs were never apprised that they were expected to engage in preliminary trial of the merits to protect the jurisdiction. Further, where the issue is one of fact intermingled with the merits, the only appropriate way to try the issue is by regular trial. In such a case, too, the evidence to sustain the jurisdiction in the preliminary inquiry need not be as clear as that to establish the fact on

the merits, because a "suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within the jurisdiction, unless the facts, when made to appear on the record, *create a legal certainty* of that conclusion" (*Wetmore v. Rymer*, supra, p. 128, reversing).

Furthermore, unlike in *KVOS, Inc. v. Associated Press*, supra, the plaintiffs' case on jurisdiction does not rest on a bare allegation in the complaint. Here the 1938 contract is an exhibit attached to the complaint; that contract as well as certain exhibits attached to petitioners' affidavits are more consonant with a pledge than an outright transfer of title; the Court of Appeals so held and the petition does not challenge that conclusion (see footnote 4, supra). There being no findings by the District Court, there is no basis for a jurisdictional argument now. *Wetmore v. Rymer*, supra, shows that even in a case involving jurisdictional amount, where the trial court decides to try that issue itself rather than let it go to the jury, "its action must take a form that will enable this Court to review it, so far as to determine whether the conclusion of the court below was warranted by the evidence before that court." Here it is patent *that the District Court did not even presume to try and decide any question of fact.*

Lack of Findings and Academic Nature at This Time of Questions Raised by Petitioners.

The petitioners are asking this Court to assume a burden which it is improper to impose upon it. Since the District Court rendered no opinion and made no findings, the only indication of the basis upon which it dismissed the cause appears in a statement made by it from the Bench (R. 152, quoted in the petition at p. 11):

> "I. think * * * this transaction was legal, in the sense that the Commission had the legal right; and therefore * * * it is incapable that this is a suit against the United States * * *."

Apparently it concluded that under Section 207 of the *Merchant Marine Act of 1936* the Commission had legal authority to acquire outright title to shares in private corporations and was not restricted to acquiring stock only as security. Proceeding from this premise alone, it arrived at its jurisdictional conclusion. But the conclusion does not follow from the premise. Assuming the premise, there remains the question of fact whether the particular transaction of 1938 was a pledge or an outright transfer. If this Court should now decide that the Commission had no legal authority to acquire outright title, summary judgment for respondents would be in order (see pp. 6, 7, supra). But if this Court were to decide that the Commission had authority to acquire outright title, no judgment for petitioners follows because the question of fact still remains. The complaint alleges that the transaction was a pledge, and at the pleading stage the allegation must be taken as correct. If the proof at a trial supports the pleading, on that question of fact, the question of legal authority becomes academic. This Court should not be asked to grant a writ of certiorari to decide what may prove to be an academic question, and for that reason has ordinarily denied writs of certiorari to review decisions of Circuit Courts of Appeal that do not terminate the cause (*Hamilton-Brown Shoe Co. v. Wolf Bros & Co.*, 240 U.S. 251, 258; *Robertson and Kirkham, Jurisdiction of the Supreme Court*, p. 623). Essential facts should be determined before grave questions are passed upon, "and that determination requires a hearing in due course upon the issues raised by the pleading." *Polk Company v. Glover*, 305 U.S. 5, 10. Moreover, if the question ever reaches this Court in orderly process after trial, and it can do so only if the question of fact is decided adversely to respondents, it should and will come with an opinion of the Court of Appeals on the subject, so that this Court may have the benefit of that court's views (*Brown v. Fletcher*, 237 U.S. 583; *United States v. Ballard*, 322 U.S. 78, 88).

Furthermore, on the issue of fact this Court should not be asked to review the case until the trial court has made findings

of fact, as it must do after a trial and as it has not yet done. *Panama Mail S.S. Co. v. Vargas*, 281 U.S. 670; *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316; *Borden's Co. v. Baldwin*, 293 U.S. 194, 213.

Suability of United States Maritime Commission, as Such

The petition seeks to present to this Court the question whether the United States Maritime Commission, as an agency of the United States, was a suable entity.

The Federal Tort Claims Act, enacted August 2, 1946 (see pages 2 and 16, supra) makes the United States directly liable for torts of the Commission. Whether the Commission was a suable entity before August 2, 1946 is therefore not now a question of general importance. Moreover, it is not presented in this case. The Court of Appeals did not base its judgment on a determination of that question but, resting on the principle of *United States v. Lee*, supra, held that the suit was one against individuals. Its reflections on the suability of the Commission were prefaced by the remark:

> "While it does not alter the basic problem under consideration we observe another facet of the jurisdictional question which buttresses our conclusion to reject the defendant's claim of immunity at this time." [154 F.2d 307 at 311]

This Court should not be asked to grant a writ to review an abstract question which has no future importance and upon which decision of the case does not rest (cf. *Alpha Steamship Corp. v. Cain*, 281 U.S. 642). If the question is necessary to decision after a trial, it will be time enough to consider it then.

CONCLUSION

We respectfully submit that the petition should be denied.

Dated: August 29, 1946.

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FILE COPY

In the Supreme Court of the United States

OCTOBER TERM 1946

No. 207

EMORY S. LAND, etc., et al.,
Petitioners,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR ESTATES COMPANY, et al.,
Respondents.

BRIEF FOR RESPONDENTS
On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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In the Supreme Court of the United States

OCTOBER TERM 1946

No. 207

EMORY S. LAND, etc., et al., *Petitioners,*

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR ESTATES COMPANY, et al., *Respondents.*

BRIEF FOR RESPONDENTS

Statement of the Case

1. JURISDICTION

This action was begun in the District Court for the District of Columbia. As the defendants were residents of the District (R. 2; Compl. para. 8), that court had jurisdiction under 18 D.C. Code, Sec. 41 as amended, 49 Stat. 1921 (cf. *Stark v. Wickard*, 321 U.S. 288). From the judgment of the District Court an appeal was taken to the Court of Appeals for the District of Columbia, under the Act of February 9, 1893, 27

All emphasis in quotations has been added, unless otherwise noted.

Stat. 434 as amended and as incorporated in D.C. Code, Title 18, Chapter 2, Section 260. After decision of the Court of Appeals, this Court granted certiorari.

2. THE PROCEEDINGS

The respondents were the plaintiffs in the District Court and the appellants in the Court of Appeals. Petitioners were the defendants in the District Court and appellees in the Court of Appeals.

The District Court dismissed the complaint, with prejudice, of its own motion (R. 79). At the time it took this action, the only pleading on file was the complaint. Issue had not yet been joined (and never has been), no motions had been made by defendants, and the case was before the court merely on the plaintiffs' motion for a temporary injunction.

The only papers filed in the District Court by the defendants prior to the dismissal were certain *ex parte affidavits*, and these had been presented only in opposition to the application for temporary injunction (so recited in the judgment, R. 79, and by counsel at the time of offering them, R. 113, and see R. 82). The District Court made no findings. From its judgment of dismissal (R. 79) the plaintiffs appealed (R. 81).

The Court of Appeals reversed and ordered the cause remanded, so that issue might be joined and the case determined on its merits (R. 171, 172). Its opinion is reported at 154 F.2d 307.

3. THE ISSUES PRESENTED

The basis of the trial court's dismissal, as revealed by a remark from the bench (R. 152), was that, without consideration of the truth or falsity of any allegation of the complaint, the suit was one against the United States.

In the Court of Appeals the petitioners contended both (1) that the action was one against the United States and

therefore beyond the jurisdiction of the court for lack of consent to be sued, and (2) that the complaint did not state a claim upon which relief could be granted. But in this court petitioners no longer *openly* contend that the complaint fails to state a claim for relief, and they *purport* to rest solely on their so-called jurisdictional contention. Nevertheless, underlying every argument made by them on the "jurisdictional question" will be found either or both of two bland assumptions: (1) that the complaint does not state the claim for relief which we say, and the Court of Appeals held, that it asserts; and (2) that the *ex parte* affidavits introduced by petitioners in the District Court conclusively refuted the allegations of the complaint and, without the necessity of any trial, established as a fact that the respondents have no cause of action. The case is discussed by petitioners as if there had been trial of fact and a general verdict in their favor, and they proceed as if they are therefore now entitled to select from their affidavits whatever items of "fact" support such a general verdict.[1] Consequently, they proceed upon a course in direct opposition to the correct procedure; since this case is here on a dismissal of the complaint without trial, every inference of fact must be drawn in favor of the plaintiffs.

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[1]Indeed, in their petition for a writ of certiorari, in footnote 8, p. 12, they presented a curious inversion of regular procedure in the statement:

> "Since the court below settled the jurisdictional defense adversely to petitioners, further proceedings in the district court would necessarily consist of a formal trial to establish facts already of record."

We replied thus (Brief in opposition, footnote 13, p. 17):

> "Facts are to be established by trial; trials may not be avoided by prejudging facts. Plaintiffs are entitled to a trial to introduce their evidence in an orderly way. Cf. *Myers v. Bethlehem Corp.*, 303 U.S. 41, at 51, 52: 'Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.' "

In footnote 9, p. 12, of their present brief petitioners restate the same idea in slightly altered form.

The so-called "jurisdictional question" is spurious. As we shall show, if the plaintiffs prove their cause of action, the suit is not one against the United States; conversely, if they fail to establish their allegations, their cause will fail on the merits without reference to jurisdiction. In short, the jurisdictional question actually depends on the merits of the case. For that reason, we shall first discuss the question whether the complaint states a claim for relief and the nature of the claim asserted (pp. 20 to 70, infra). Once the nature of the claim so asserted is fully stated, every argument presented by the petitioners on the "jurisdictional question" is revealed for what it is, as question-begging, unjust, and unsound.

We shall then directly consider the "jurisdictional question" (pp. 70 to 112, infra). The greater part of petitioners' brief is devoted to a discussion of the right to refer to their affidavits, all of which is irrelevant, as we shall show (at pages 12 to 17, infra, and pp. 113 to 125, infra).

Under the heading "Question Presented" petitioners' brief states three questions. The inappositeness of the first is shown at pages 16, 17, infra, and in Point Three of our Argument. The third question is considered at pages 107-112, infra. The second question approaches a question actually present, but as stated it involves false assumptions (see discussion at p. 12, infra). We state the true questions at page 17, infra.

4. THE FACTS

Petitioners' brief contains a "statement" of purported "facts" which, except for its description of the complaint, are culled almost exclusively from the *ex parte* affidavits filed by them in opposition to the motion for a preliminary injunction. As we later show (pp. 12-17, infra), these affidavits were not considered by the court when it dismissed the complaint *sua sponte*. The

assertions and elaborations selected by petitioners from these affidavits may not be considered, "as these affidavits are a part of the record only for the purpose of determining the propriety of a temporary injunction." *Gibbs v. Buck*, 307 U.S. 66, 76; *Polk Company v. Glover*, 305 U.S. 5, 8. That issue is not before this Court; in appealing, plaintiffs designated under Rule 75(d) of the *Rules of Civil Procedure* only one point on which they intended to rely on appeal, namely, that "The Court erred in dismissing the Plaintiffs' complaint" (R. 81).[2]

Whether the complaint states a claim for relief and the nature of the claim may be determined only by reference to the complaint, the allegations of which must be accepted as true. *Tahir Erk v. Glenn L. Martin Co.*, 116 F.2d 865, at 867 (4 Cir.).

We therefore present a summary of the allegations of the complaint as the facts.

The suit was not brought against the United States government but against five individuals who were members of the United States Maritime Commission at the time the complaint was filed and who, acting without authority of law, were inflicting injury upon the plaintiffs by detaining their property and threatening to sell it to others. The action was brought to recover personal property consisting of shares of stock of American President Lines, Ltd., a private corporation, and the certificates representing the shares, and to enjoin sale to others *pendente lite*. It is alleged that plaintiffs are the owners and have been since before 1938, that in 1938 the corporation was indebted to the United States Maritime Commission for a large sum of money (R. 6, Compl. para. 30), that plaintiffs then pledged the shares to the Commission as collateral to secure

[2] And, as appellants, they designated for the record on appeal only the complaint, judgment, and appeal papers (R. 159). The petitioners, as appellees, required inclusion of the affidavits by counter-designation (R. 160).

the debt of the corporation (R. 6, Compl. para. 29, 30), that thereafter and before the complaint was filed the debt was paid in full, and that defendants, who had thus acquired possession, refuse to surrender the shares and threaten to sell them to others (R. 6, 7, Compl. para. 33, 34). It is alleged that in August 1938 the plaintiffs endorsed their certificates in blank and delivered them to the Commission under a written contract dated August 15, 1938, a copy of which is attached to the complaint as Exhibit A (R. 8).

Apart from that contract, it is conceded that respondents are the owners and entitled to possession of the property withheld by petitioners. The issue on the merits arises out of the claim of the petitioners that, by virtue of the contract, title to the property was conveyed outright, the respondents claiming and alleging in their complaint that it created only a pledge as security for the indebtedness.

(a) THE CIRCUMSTANCES IN WHICH THE CONTRACT OF AUGUST 15, 1938 WAS MADE.

For some years before 1928, respondent Dollar Steamship Line (hereafter referred to as "Dollar of California") was engaged in freight and passenger steamship services (R. 2; Compl. para. 9). Its successor, The Dollar Steamship Line Inc., Ltd. (hereafter referred to as "Dollar of Delaware"), extended and enlarged the service in the transpacific and round-the-world trades. (Dollar of Delaware and American President Lines, Ltd. are identical, the name having been changed some time after 1938 (R. 2, Compl. para. 10).) Dollar of Delaware entered into contracts with the United States under the provisions of the Merchant Marine Act of 1928, whereby it agreed to construct two transpacific liners, carry the mails, and maintain and develop steamship service on specified trade routes. To complete the vessels, it borrowed funds from the Shipping Board, and it did construct them (R. 2, 3; Compl. para. 10, 11).

Dollar of Delaware incurred indebtedness to the United States in reliance on these contracts, and it maintained the service required by the contracts until the United States cancelled its ocean mail contract on June 30, 1937 pursuant to the Merchant Marine Act of 1936. That Act provided for direct operating differential subsidies in lieu of ocean mail contracts (Title 46 *U.S.C.*, Sec. 1171-1182), and also provided for the settlement and payment of claims for damages arising out of the premature termination of the mail contracts (Title 46 *U.S.C.*, Sec. 1141-1143) (R. 3; Compl. para. 12).

But the Maritime Commission refused to grant an operating differential subsidy to Dollar of Delaware (R. 3; Compl. para. 12) until January 25, 1938. On that date, a temporary operating subsidy was granted, but only on condition that Dollar of Delaware be reorganized by a contribution to its capital of $500,000, a settlement by its trade creditors of their claims (R. 3; Compl. para. 13), and the release by other corporate creditors of their claims in return for new stock (R. 3; Compl. para. 14).

While claiming that the subsidy was inadequate and not in conformity with the standards prescribed by law (R. 4; Compl. para. 17), Dollar of Delaware was compelled to accede to the conditions prescribed and to accept the subsidy granted as an alternative to failure to maintain its service and to meet its obligations (R. 4; Compl. para. 18).

When this temporary subsidy expired six months later on July 25, 1938, an extension or renewal was refused, although the Commission knew that the company would be unable to carry on operations and meet its obligations as they accrued without the aid authorized by law (R. 4; para. 19).

During all this period Dollar of Delaware was indebted to the United States through the Maritime Commission for a large sum. By August 15, 1938 this amounted to approximately

$7,500,000 (R. 6; Compl. para. 30). As security, the Commission held a mortgage upon properties of Dollar of Delaware. As further security it held the personal obligation of two of the respondents for that part of the total indebtedness consisting of ship mortgage notes covering the acquisition of a number of steamships. These two respondents, R. Stanley Dollar and Dollar of California, were liable on the ship mortgage notes as "makers, co-makers, guarantors or endorsers,"[3] and their liability was that of sureties for the debt of the principal, Dollar of Delaware.

By August 15, 1938, Dollar of Delaware was faced with the alternative of failing to meet its obligations as they accrued, including the obligations to the United States itself, or submitting to the demand of the Commission that it enter into the contract, a copy of which is attached to the complaint as Exhibit A (R. 4, 5; Compl. para. 21, 22). Under that pressure, the contract was made, and the Maritime Commission then granted a five-year subsidy in a more adequate amount than the temporary six months' subsidy that had expired July 25, 1938 (R. 5, 6; Compl. para. 23, 24, 26).

(b) THE CONTRACT OF AUGUST 15, 1938.

The parties to the contract were Dollar of Delaware itself, a group of its stockholders,[4] certain creditors,[5] and the United

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[3]The quotation is taken from the recitals of paragraph 14 of the agreement between the plaintiffs and the Maritime Commission dated August 15, 1938, a copy of which is attached to the complaint as Exhibit A (R. 14). The facts as to the security appear from this exhibit.

[4]Dollar Steamship Line, The Robert Dollar Co., Admiral Oriental Line, R. Stanley Dollar, Executors of the Estate of J. Harold Dollar, H. M. Lorber, The Anglo California National Bank, Mortimer Fleishhacker. Herbert Fleishhacker is named as a party in the contract but is deleted in a Supplemental Contract dated August 28, 1938, copy of which is attached to the complaint as Exhibit B (R. 19). Hereafter, when we speak

States Maritime Commission. Respondents are some of these stockholders or their successors.

The stockholders agreed to transfer or cause to be transferred to the Commission 2,100,000 shares of B stock and 113,206 shares of A stock of Dollar of Delaware, part of which was subject to prior pledges, with certain rights of the Commission in respect to voting or securing release of certain of the shares subject to prior pledges. The stock to be transferred constituted 92% of the voting control of the company (R. 3, 4, Compl. para. 15; R. 5, Compl. para. 21). In consideration, the Commission agreed to release the liability of respondents R. Stanley Dollar and Dollar of California to the Commission as "makers, co-makers, guarantors or endorsers of the ship mortgage notes." However, there was no release or discharge of the indebtedness owed by Dollar of Delaware to the United States, nor was it reduced by one iota. Paragraph 14 of the contract (R. 13, 14) expressly provided that the indebtedness of the company remained unaffected.

Pursuant to the contract, the stockholders thereafter did transfer their shares to the Commission (R. 6; Compl. para. 28).

Although the preamble to the contract recited that a consideration for it was the granting by the Commission of a five-year operating differential subsidy, the contract itself expressly exonerated the Commission from any obligation whatever to make a subsidy grant and left the granting of a subsidy to the subse-

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of the Contract of August 15, 1938, we mean the contract as supplemented by the contract of August 28th.

Pacific Lighterage Corporation, Olympic Refining Company, Dollar Wharf and Warehouse Company, and Dollar Terminal Steamship Company.

quent judgment of the Commission (Contract, para. 23, R. 16).[6]

So far as this contract is relevant to the suit, it may be summarized as one whereby certificates representing 92% of the voting control of Dollar of Delaware were transferred to the Commission, and the latter undertook to release two of the transferring shareholders from co-liability on certain notes secured by ship mortgages.

(c) PAYMENT OF THE INDEBTEDNESS.

Thereafter, Dollar of Delaware paid all of its indebtedness to the United States, amounting to some $7,500,000 (R. 6; Compl. para. 27, 30).

The debt being paid, the owners were entitled to a return of all security and collateral. The respondents, the owners of the shares at the time of the 1938 transfer or their successors, demanded return of their property from the petitioners who were in possession, asserting that it had been held only as collateral for a debt then paid. The petitioners refused to surrender the shares (R. 5, 7; Compl. para. 29, 34).

(d) THE COMPLAINT ALLEGES THAT THE STOCK WAS TRANSFERRED IN 1938 AS COLLATERAL ONLY.

Respondents' complaint alleged that under the agreement of 1938 the transfer of the stock in Dollar of Delaware to the United States Maritime Commission was not an outright transfer of title but merely a transfer of the stock as collateral to secure the payment of the $7,500,000 indebtedness.

Thus in paragraph 29 (R. 6) it is alleged that "such transfer was in fact and in legal effect collateral security for the indebt-

[6]While the parties were free to withdraw from the agreement if a subsidy was not granted within sixty days, the granting of any subsidy, however small, would have satisfied the condition (R. 15, para. 21, 22 of Contract).

edness of the company to the United States Maritime Commission." Paragraph 30 also states that the "shares were transferred as collateral security" for the indebtedness.

Stating the matter somewhat differently, it is the respondents' position that *the transfer of their stock in 1938 was a mere substitution of collateral to secure the indebtedness of Dollar of Delaware.* A portion of that indebtedness had originally been secured by the personal liability of two respondents as "co-makers, guarantors or endorsers" of the indebtedness of the Dollar of Delaware. The release of their liability as such guarantors and the transfer of the stock was a mere substitution of collateral.

(e) THE COMPLAINT ALSO ALLEGES LACK OF AUTHORITY IN THE COMMISSION TO TAKE THE STOCK EXCEPT AS COLLATERAL.

The complaint further alleges that under the law the United States Maritime Commission was wholly without authority to acquire outright title to the stock of the Dollar of Delaware, and that its only legal authority with respect to acquisition of that stock was to acquire it as collateral for the purpose of protecting, preserving or improving collateral held by the Commission to secure indebtedness (R. 5, 6; Compl. para. 25, 31, 32).

(f) INSTITUTION OF THE SUIT.

After payment of the indebtedness, petitioners not only declined to return the property but offered the stock for sale to the public. The complaint also alleged that, unless restrained by injunction, petitioners would disperse it by sale to the public to respondents' irreparable injury (R. 7; Compl. para. 34-37).

(g) ASSERTION OF TITLE IN THE UNITED STATES.—IT IS PETITIONERS WHO MAKE THAT ASSERTION, NOT THE UNITED STATES.

In their brief the petitioners assert repeatedly, in a variety of ways—in their statement of the questions, their statement of facts, their summary of the argument, and throughout the argument—that the "United States" claims absolute ownership of the stock and that "the complaint alleges possession of the stock by petitioners under a claim of absolute ownership by the United States." The petitioners thereby beg the issue and erroneously state the facts. The allegation of the complaint is not that the United States claims title but that (R. 6, para. 29):

> "although such transfer was in fact and in legal effect collateral security for the indebtedness of the company to the United States Maritime Commission, nevertheless after the satisfaction of all of said debts and obligations to the United States, *the defendants have asserted and claimed,* and do now assert and claim that the United States is the lawful owners of the shares of stock so transferred by the plaintiffs to the United States Maritime Commission."

The claim that the United States has title is made by the individual petitioners as their defense against the charge of tortious violation of respondents' ownership and right of present possession. That assertion or claim has not been made by the United States in any form, anywhere, and the record discloses no such assertion or claim by it. It has been made only by counsel for petitioners by way of argument and by the petitioners. The United States *could* have asserted a claim of ownership by intervening. This it has *never* done.

5. THE CAUSE WAS DECIDED BY THE DISTRICT COURT ON THE COMPLAINT ALONE AND IN NO PART ON THE AFFIDAVITS.

As we have said (pp. 4, 5, supra), the affidavits were a part of the record only for the purpose of determining the propriety

of a temporary injunction. Petitioners would escape this fact and the decisions of this court in *Gibbs v. Buck*, supra, and *Polk Company v. Glover*, supra, by asserting (Brief, p. 20) that

> "the affidavits filed in this case were conceded to be of broader significance. Here the respondents did 'submit the case to be decided upon the merits upon the bill * * * and affidavits.'"

This assertion is based on the further assertion (Brief, p. 19) that

> "respondents expressed the opinion before the district court that there was no 'real dispute upon the facts', and that the proceeding raised 'really a question of law' (R. 148); they further suggested that the parties agree 'that this hearing may be deemed a hearing upon the merits of the case, and that a final decree instead of an interlocutory injunction, may be rendered at this time' (R. 148)."

We impale these assertions at once, for there is simply no basis in fact for them. When the cause came on for hearing on plaintiffs' application for a temporary injunction, the District Judge expressed doubt of his jurisdiction (R. 111) before the affidavits were even filed (R. 113), briefs were then received (R. 114), and a second hearing was held solely for oral argument on the jurisdictional question. At the first hearing, petitioners' counsel had stated that there was no issue of fact in the record and that "I do not think any such issue can be raised * * * even on an ultimate trial" (R. 112). Respondents' position on the subject of jurisdiction was the same in the District Court as in the Court of Appeals and in this Court (R. 117-148), namely, that the test of the court's power to proceed was exclusively the allegations of the complaint (R. 117).[7]

[7] Thus respondents' counsel said (R. 117):

> "The position of the plaintiffs is based upon the allegations of their complaint * * *. We will confine ourselves to those allegations for the purpose of discussing jurisdiction, for they alone are material to the Court's power to proceed."

The petitioners' position in the District Court was the same as that of respondents, i.e., that the question of jurisdiction turned on the allegations of the complaint. It was in this situation that respondents' counsel made the suggestion to which petitioners now refer. Respondents' counsel did not thereby submit the case upon the merits; he certainly did not submit it upon the petitioners' *ex parte* affidavits, in any part. He merely stated his belief that the case would present "no real dispute upon the facts" and that the parties should be able to agree on the facts and thus leave only a question of law so that the hearing could become a final hearing on the merits (R. 148).

If petitioners' counsel had accepted the suggestion, the parties would have attempted to state an agreed set of facts. But the suggestion was rejected immediately. Petitioners' counsel accused respondents' counsel of putting the "cart before the horse" in discussing the merits at all. He said (R. 149):—

> "* * * it is perfectly clear that the initial inquiry which must arise in this case is the inquiry whether or not the Court has jurisdiction of the subject matter of the suit"

and that

> "* * * it is not necessary at all, nor appropriate in determining the issue of jurisdiction, to determine the merits of the case first. Counsel [for respondents] would have this Court decide whether or not there is merit in the suit, and then determine whether or not there is jurisdiction in the Court."

Thereupon, petitioners' counsel attacked the court's jurisdiction on the very ground appearing in Part II of their brief in this court (pp. 29 et seq.):—that whatever the merits or facts of the case, the suit was one against the government on the theory that the United States had "colorable" claim to the stock, coupled with possession (R. 151), and counsel even declined to discuss whether the complaint stated a cause of action (R. 152). Issues of fact were never defined or discussed. Nowhere did respond-

ents agree that the *ex parte* affidavits stated the facts or that the cause was to be submitted on those affidavits. Nowhere did petitioners' counsel suggest that the case was being submitted upon those affidavits, which they expressly offered only in opposition to the motion for preliminary injunction (R. 113). The District Court gave no consideration to the affidavits in passing on the jurisdiction and dismissing the complaint. At the first hearing it had stated its doubt of its jurisdiction before the affidavits had even been offered, and at the conclusion of the second oral argument it stated that respondents' argument had not changed its mind (R. 152), and that:

> "* * * I think two things. One is that this transaction was legal, in the sense that the Commission had the legal right; and therefore I think it is inescapable that this is a suit against the United States and therefore that the complaint must be dismissed and the injunction dissolved" (R. 152).

The meaning of this statement is clear enough, namely, that because the District Court believed that the United States Maritime Commission had legal power to acquire the stock, therefore the suit was one against the United States regardless of any consideration of whether or not the particular transaction was or was not a pledge or a sale.

Had the District Court's decision rested on any consideration of matter outside the complaint, findings would have been appropriate (*Rules of Civil Procedure*, Rule 52). Yet neither party requested findings, and none were made. Moreover, the order was drafted with care to show that the affidavits had been received only in opposition to a motion for preliminary injunction and that the dismissal was on an independent ground. The form of the order leaves no room for dispute (R. 79):—

> "This cause having come on for hearing on plaintiff's motion for a preliminary injunction; affidavits having been filed in opposition to the motion for preliminary injunc-

tion; briefs having been submitted, and counsel for the parties having been heard on November 15 and December 20, 1945; it is hereby ordered, adjudged, and decreed that:

1. The application of plaintiffs for a preliminary injunction be, and it is hereby denied.

2. On the Court's own motion, the complaint be and is hereby dismissed with prejudice."

The Petitioners Did Not Contend in the Court of Appeals That the Affidavits Had Any Bearing on the Jurisdictional Question or That the District Court, in Dismissing for Lack of Jurisdiction, Relied Thereon. That Argument Is First Made in This Court.

In the Court of Appeals the contention made by petitioners to support their reference to the affidavits was (Appellees' Brief, p. 5, fn. 3) that "The affidavits are, of course, pertinent in considering the objections raised by appellee to the sufficiency of the complaint. *National War Labor Board v. Montgomery Ward & Co.*, 144 F. 2d 528, 531 (App. D.C.)." This was nothing more than an argument that the District Court's action was similar to a dismissal on a "speaking motion," which, like a motion for summary judgment, can only be granted if there is no genuine issue of fact. The Court of Appeals pointed out that there was a genuine issue of fact, and petitioners nowhere in their present brief deny that this is so.

It was not until their petition to this Court for a writ of certiorari that petitioners advanced the argument that the jurisdictional question here involved is, like jurisdictional questions of amount or citizenship, one which a District Court may try in advance of the main trial, or that the District Court here had engaged in any such jurisdictional trial or had disposed of the jurisdictional question, not on the complaint, but on evidence outside the complaint.

For this reason the first "question" stated by petitioners is non-existent. The Court of Appeals did not, as petitioners allege, hold that the District Judge was without power to "search the record" in dismissing an action on jurisdictional grounds or that the District Court "should * * * have rejected these affidavits." These questions were never presented to the Court of Appeals.

Strangely enough, while petitioners argue at length the question of the District Court's power to try the jurisdictional question preliminarily, their brief nowhere claims that the affidavits support the dismissal on the merits and nowhere points out just how the affidavits support the dismissal on jurisdictional grounds. In Point Three of our brief (pp. 113 to 124, infra), we shall show that, even if they could properly be referred to, the affidavits do not and cannot possibly support the dismissal on any ground.

The Questions Presented

1. Where a complaint alleges (a) that at a given date the plaintiffs pledged certain stock with the United States Maritime Commission to secure an indebtedness, (b) that the Commission had no legal authority to purchase, i.e., acquire the stock except as security, (c) that the debt has since been paid, and (d) that the defendants retain possession and refuse to return the stock to the plaintiffs, is a claim for relief stated?

2. Is such an action against individuals to recover possession an action against the Government because the defendants are Government officials who, or whose predecessors, originally obtained possession under the pledge and now assert as their defense that the stock is the property of the United States?

3. If so, has not consent to maintenance of the suit been granted by the *Administrative Procedure Act* (1946)?

Summary of the Argument

I. With Respect to the Question Whether the Complaint States a Claim for Relief and Its Nature.

Congress conferred on the Commission no power to buy corporate stock but only to acquire stock as collateral. The Commission therefore acquired on behalf of the United States no more than the law empowered it to acquire. Additionally, the transaction was in fact only a pledge by way of substitution of collateral. The 1938 contract does not purport to be a sale but contains on its face compelling indicia that it was only a security transaction, for example, express provisions that there was to be no reduction of the principal indebtedness as the result of the alleged transfer of title. Moreover, any transfer, even if it appears on its face to be absolute, may only be a transfer by way of security and may always be shown to be such. Extrinsic facts alleged in the complaint support that construction. A suit on the theory that a transfer was by way of security is not one to reform or alter the contract but proceeds on the basis of the real transaction of the parties. The allegations of the complaint that the contract was a pledge therefore control and entitle the plaintiffs to their day in court.

II. With Respect to the So-Called Jurisdictional Claim.

The jurisdictional question is spurious, for it is identical with the merits. For purpose of the question whether the suit is against the United States, the allegations of the complaint are taken as true. Judgment will not be *res judicata* with respect to the United States, because the suit is not one against it but is a possessory action against certain individuals based on their own wrongdoing in withholding possession from respondents. While it would be a defense for petitioners to establish at a trial that another, for whom they have acted as agent, has a right superior to respondents, the mere fact that they claim to act as agents for another and assert no personal interest is no defense, and the assertion that their principal is the government

and that it has title does not convert the case into one against the sovereign or defeat the jurisdiction. Respondents' rights are possessory and not based on contract with the United States or on a title derived from it. The case of *United States v. Lee*, 106 U. S. 196, is conclusive. The decaying doctrine of sovereign immunity is in disfavor and should not be extended to a type of case to which it has never had application. Moreover, even if the present suit were a suit against the Commission or the United States, the United States has given consent to the suit by the *Administrative Procedure Act*, which became effective September 11, 1946, after the Court of Appeals had rendered its decision.

III. With Respect to the Propriety of a Summary Disposition of the Case on the Basis of Petitioners' Ex Parte Affidavits.

The District Court did not in fact try any question on evidence outside the complaint and took no action on any factual question. Moreover, its power to base a dismissal *sua sponte* on matters outside the complaint is tested by the same principles as its power to grant a motion for summary judgment. Such a motion may be granted only if there is no genuine issue of any material fact and may not be perverted into a trial of disputed questions of fact upon affidavits. No summary judgment for petitioners on the merits was here possible, considering the nature of the respondents' claim for relief, and no such claim is now made. Indeed, if the affidavits could properly be considered, they would come close to demanding summary judgment for respondents. Since the factual issue on "jurisdiction" is identical with that on the merits, the court could not summarily dispose of the issue on affidavits under the guise of jurisdiction:—Dismissal for lack of jurisdiction on a preliminary trial requires proof to a legal certainty. Additionally, on the type of jurisdictional question involved here, i.e., whether sovereign immunity applies, the allegations of the complaint are taken as true.

ARGUMENT

POINT ONE

THE COMPLAINT STATES A CLAIM FOR RELIEF AGAINST THE INDIVIDUAL PETITIONERS

I.

PRELIMINARY:—THE TEST OF SUFFICIENCY OF A COMPLAINT

In considering whether a complaint states a claim for relief, the question is not whether the complaint is deficient as a matter of pleading but whether it reveals that a cause of action *cannot possibly* be stated. Otherwise a motion to dismiss does not lie. *Atwood v. National Bank of Lima*, 115 F.2d 861 (6 Cir.); *Tahir Erk v. Glenn L. Martin Co.*, 116 F.2d 865 (4 Cir.). In the *Tahir Erk* case, the court said (at p. 870):

> "Our primary consideration, in the instant case, has been with the type of deficiency which would admit a motion to dismiss. It is our considered opinion that the motion to dismiss for insufficiency is applicable, as a general rule, only where it is clear and apparent to the court that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the specific claim. Leimer v. State Mut. Life Assur. Co., supra, 108 F.2d at page 306."

Again (p. 869):

> "We are mindful that in weighing the validity of a motion to dismiss for insufficiency, the duty of the court is not to test the final merit of the claim in order to determine which party is to prevail. Our duty, rather, is to consider whether in the light most favorable to the plaintiff, and with every intendment regarded in his favor, the complaint is sufficient to constitute a valid claim."

In the Report to this Court by the Advisory Committee on the Proposed Amendments to the Rules of Civil Procedure, June 14, 1946, in the discussion under Rule 12 (reported at 5 F.R.D., p. 443, 2d col.), *Bell v. Preferred Life Assurance Society*, 320 U.S. 238, and numerous decisions of the Second, Third, Fourth, Fifth, Seventh and Eighth Circuits are listed as "reversing judgments to prevent final determination on mere pleading allegations alone."[8]

A fortiori, if a motion to dismiss would not lie, then here, where no motion to dismiss was made and no opportunity was given to amend to remove deficiencies because no deficiencies were pointed out, dismissal with prejudice for failure to state a claim was clear error and out of the spirit of Rule 15 of the *Rules of Civil Procedure*.

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[8] *Sparks v. England*, 113 F.2d 579 (8 Cir.);
Continental Collieries, Inc. v. Shober, 130 F.2d 631 (3 Cir.);
Downey v. Palmer, 114 F.2d 116 (2 Cir.);
DeLoach v. Crowley's Inc., 128 F.2d 378 (5 Cir.);
Leimer v. State Mutual Life Assurance Co. of Worcester, Mass., 108 F.2d 302 (8 Cir.);
Rossiter v. Vogel, 134 F.2d 908 (2 Cir.); 148 F.2d 292;
Karl Kiefer Machine Co. v. United States Bottlers Machinery Co., 113 F.2d 356 (7 Cir.);
Chicago Metallic Mfg. Co. v. Edward Katzinger Co., 123 F.2d 518 (7 Cir.);
Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc., 131 F.2d 419 (8 Cir.);
Publicity Bldg. Realty Corp. v. Hannegan, 139 F.2d 583 (8 Cir.);
Dioguardi v. Durning, 139 F.2d 774 (2 Cir.);
Package Closure Corp. v. Sealright Co., Inc., 141 F.2d 972 (2 Cir.);
So also the Ninth Circuit in, for example, *Bowers v. E. J. Rose Mfg. Co.*, 149 F.2d 612.

II.

THE GROUNDS UPON WHICH THE COMPLAINT STATES A CLAIM FOR RELIEF: THERE ARE TWO; EACH IS INDEPENDENTLY SUFFICIENT, BUT EACH SUPPORTS THE OTHER.

The ultimate issue in the case is whether the contract of August 15, 1938 worked a pledge or an outright sale and purchase of shares, i. e., whether it transferred a lien to secure a debt, or an outright title. If it did the latter, its legal nature was that of a sale and purchase, whatever the consideration for transfer of title, and we shall so refer to this alternative. In passing on the ultimate issue—pledge *or* sale—two questions are presented, one a question of law, the other a question of mingled law and fact:

1. Had authority been conferred by law on the Maritime Commission to acquire the stock of a private corporation, outright, or was not its power limited to the acquisition of stock as collateral to secure a debt?

2. Assuming that the Commission had the power to acquire an outright title, nevertheless what is the proper construction of the particular contract and transaction involved in this case?

Apart from form or artfulness of pleading and having regard, as we must, to substance only (cf. p. 20 to p. 21, supra), the complaint clearly raises both issues, the first in paragraphs 25, 31, and 32 (R. 5, 6), and the second in paragraphs 29 and 30 (R. 6). Rule 8(e)(2) of the *Rules of Civil Procedure* provides that a party may set forth two or more statements of a claim alternatively, whether consistent or inconsistent, and may do so in a single count. Moreover, these two claims are not inconsistent but independent claims, each leading to the same conclusion.

On the purely legal question, the Commission could acquire on behalf of the United States only what the law empowered

it to acquire, and, if Congress never conferred upon the Commission power to acquire the shares by purchase but only as security for a debt, then the Commission acquired the stock only as security regardless of the sort of transaction the parties in 1938 thought they were effecting.

The judgment of the Court of Appeals can be affirmed without deciding this first or legal issue, but it can be reversed only if that issue not only is decided but is decided adversely to respondents. If that issue is decided against our contention, the case is not thereby ended, because it would still be necessary to try and to decide the second issue, that of mingled law and fact. There is a third course, that of not deciding the legal issue at all at this time—at the pleading stage—but of deferring decision on it until the case has been clothed with form and body by a trial of the facts. (It has been said that grave questions should not be passed upon until essential facts have been determined, "and that determination requires a hearing in due course upon the issues raised by the pleading." Cf. *Polk Company v. Glover*, 305 U.S. 5, 10.) This was the alternative followed by the Court of Appeals. Under this course, the legal question may never reach this Court, for it can do so only if the question of fact is decided adversely to respondents (see analogy of *Alma Motor Company v. The Timken-Detroit Axle Company et al.*, 328 U.S. ....., No. 11, October Term, 1946). But if it does reach the Court, it will come in orderly process after trial with an opinion of the Court of Appeals on the subject, so that this Court may have the benefit of that court's views (*Brown v. Fletcher*, 237 U.S. 583; *United States v. Ballard*, 322 U.S. 78, 88).

At the present stage, the issue on the second question, that of fact, is simply whether the complaint *effectively* alleges that the transaction was a pledge.

The Two Grounds, Though Independent, Interact:—If There Is at Least Grave Doubt of the Legality of the Transaction if Construed as a Sale, and if It May Be Construed as a Transfer by Way of Security, It Should Be So Construed.

We shall show (at pp. 25 to 41) that, apart from any question of construction of the contract, the Commission had no power to acquire the stock except as collateral. Conversely, we shall show (pp. 41 to 70) that, apart from consideration of questions of power, the contract was no more than a security transaction. But, in addition, the two questions interact. If (1) the legality of purchasing the stock is at least subject to grave doubt, and (2) if the construction of the contract as a security transaction is a wholly tenable one, then the contract must be construed as a security transaction.

That the contract is susceptible of that construction will readily appear. That the power of the Commission to purchase the stock is at least subject to doubt is beyond dispute. It suffices for this purpose to note: (1) The opinion of the Comptroller General of the United States in his Annual Report to Congress for the Fiscal Year ending June 30, 1940, (p. 40, infra), and (2) the discussion at pages 25 to 41, infra.

It is universally held that where a contract may have two possible constructions, under one of which it is illegal, that consideration must be adopted which avoids illegality. *Great Northern Railway Co. v. Delmar Co.*, 283 U.S. 686; *Brierley v. Commercial Credit Corp.*, 43 F.2d 724, cer. den. 282 U.S. 897; *Robbins v. Pacific Eastern Corporation*, 8 Cal.2d 241, 272, 65 Pac.2d 42, 58.

It follows that, where there is doubt of the legality of the transaction if construed in one of the two possible ways, the court should adopt the other construction in order to avoid the necessity of deciding the question of legality. The situation is identical in principle with the rule that courts will, if possible,

construe a statute, not only to avoid the conclusion that it is unconstitutional, but to avoid doubts on that score and to avoid a construction "which would bring into question the constitutionality of the statute." *Ann Arbor Railroad Co. v. United States*, 281 U.S. 658; *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 307; cf. *Alma Motor Company v. The Timken-Detroit Axle Company*, 328 U.S. ..., No. 11, October Term, 1946.

III.

FIRST GROUND ON WHICH THE COMPLAINT STATES A CLAIM FOR RELIEF:—THE LAW CONFERRED NO AUTHORITY ON THE MARITIME COMMISSION TO PURCHASE STOCK OF A PRIVATE CORPORATION; THE POWER OF THE COMMISSION WAS LIMITED TO THE ACQUISITION OF STOCK AS COLLATERAL TO SECURE A DEBT. IN FACT, THE COMMISSION WAS PROHIBITED FROM ACQUIRING THE SHARES EXCEPT AS COLLATERAL.

A. Lack of Authority to Purchase the Shares.

1. No Government Agency Can Act Beyond or Outside of Authority Granted by Statute, and if It Purports to Do So, Its Action Is Void.

It is elementary that no governmental agency may take any action except under express statutory authority or upon authority necessarily or naturally inferable from a duty imposed or an authority granted. Thus the authority of the Postmaster General to establish post offices carries no implied authority to lease property in which the Postmaster may carry on his activities (*Chase v. United States*, 155 U.S. 489).

Indeed, for many years it has been expressly provided (with certain exceptions in the case of the War and the Navy Departments) that "no contract or purchase on behalf of the United States shall be made unless the same is authorized by

law or is under an appropriation adequate to its fulfillment" (Title 41 *U.S.C.*, Sec. 11, derived from Act, March 2, 1861, C. 84, Sec. 10).

The Attorney General has repeatedly advised that, unless the making of a contract is expressly authorized by law or an appropriation has been made to fulfill it, or unless authority is necessarily inferred from a duty imposed or an authority given, no authority exists for its making (4 *Opinions Attorney General* 600, and 9 *Opinions of Attorney General* 18), that it is not sufficient that the agent of the United States regards a particular contract as desirable (15 *Opinions Attorney General* 235; 19 *Opinions Attorney General* 650; 31 *Opinions Attorney General* 597), that the intention of Congress that the power be exercised should be so clearly expressed as to amount to an express authority, and that otherwise the exercise of the power by an executive department is illegal (11 *Opinions Attorney General* 201).

In *United States v. Tichenor,* 12 Fed. 415, the United States claimed that defendants had quitclaimed certain land to it. The court said (p. 421):

> "Neither did these conveyances of William and Elizabeth Tichenor have the effect to vest any interest in the premises in the plaintiff. * * * there was no authority upon the part of the grantee to purchase, and therefore they were as conveyances void and inoperative. By section 7 of the act of May 1, 1820, (3 St. 568: section 3736, Rev. St.,) relating to the treasury, war, and navy departments, it is provided that no land shall be purchased on account of the United States except under a law authorizing such purchase.' It is not claimed that there was any law authorizing any one to purchase this property, and without such authority the purchase was void. 11 Op. 202."

If, then, no authority was ever conferred on the United States Maritime Commission to acquire stock in private corporations except as security, any contract having the purpose or effect of transferring title by way of purchase rather than by way of pledge would be, to that extent, ineffective, void and incapable of conferring or divesting rights. If the Commission had no power or right in law to purchase stock, it could not, by making a contract of purchase, create the power or right to hold the stock. Lack of validity for lack of power cannot be waived by either party. *City of Parkersburg v. Brown*, 106 U.S. 487, 501; *Mary A. Colby v. Title Insurance and Trust Company*, 160 Cal. 632, 117 Pac. 913; *Noonan v. Gilbert*, 68 F.2d 775 (Ct. of App., D. C.).

2. Congress Conferred No Authority on the Maritime Commission to Acquire Stock in a Private Corporation Except as Collateral: —Section 207 of the Merchant Marine Act Here Considered.

No statute confers authority upon the United States Maritime Commission to acquire, purchase, hold or dispose of shares of stock in a private corporation other than as collateral for indebtedness. Petitioners concede in their brief (footnote 17, page 33) that "authority to acquire absolute title to the stock is not conferred on the Commission in specific language." Forced to point to some statutory authority, petitioners have relied only on Section 207 of the *Merchant Marine Act of 1936*, as amended (Title 46 *U.S.C.*, Sec. 1117), asserting that "such authority is encompassed in the over-all provisions contained in Section 207." (footnote 17, p. 33).

(a) The terms of Section 207 negative the existence of power.

Section 207 refutes petitioners' claim so clearly that we quote:

> "The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the

activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter."

Clearly the section gives to the Commission only power to make contracts and disburse funds: (1) to carry on the activities authorized by the Merchant Marine Act, or (2) to protect, preserve or improve the collateral held by the Commission to secure indebtedness.

It conferred no power to take or retain title to personal property after the indebtedness for which it is collateral has been paid or to take title to it independent of the indebtedness itself.

(b) The legislative history of the Act negatives the power.

Six weeks before the execution of the contract of August 15, 1938, the Commission had no authority whatever to purchase the stock, and its power to acquire it as security was doubtful. *All this petitioners concede*, since they have predicated the Commission's authority on the amendment to Section 207 (Title 46 *U.S.C.*, Sec. 1117), enacted on June 23, 1938. What the amendment did was to add the words "and make such disbursements" and the words "or to protect, preserve or improve the collateral held by the Commission to secure indebtedness."

On that same day, June 23, 1938, Congress also enacted Section 215 of the Merchant Marine Act (Title 46 *U.S.C.*, Sec. 1125) which authorized the Commission to acquire *ships* by purchase or otherwise. On the same day Congress amended Section 202 of the *Merchant Marine Act* (Title 46 *U.S.C.*, Sec. 1112) to provide:

"The Commission may, upon such terms and conditions as it may prescribe in accordance with sound business

practice, make such extensions and accept such renewals of the notes and other evidences of indebtedness hereby transferred, and of the mortgages and other contracts securing the same, as it may deem necessary to carry out the objects of this chapter."

Sections 207, 215 and the amendment to 202 are to be read together. Each had for its purpose the extension of the Commission's authority in respect to the performance of *specific duties* and the exercise of *specific powers.*

In short, prior to June 23, 1938, the Commission was without authority to become the owner of ships. *A fortiori,* it had no power to acquire ships indirectly by acquiring the stock of a steamship line. Prior to June 23, 1938, its power to acquire stock in a corporation even as collateral was doubtful. We may fairly assume that the reason the Commission went to Congress for these amendments was to obtain authority to permit it to make an adjustment relative to the Dollar Steamship indebtedness. What it then obtained by way of authority was this:—(a) the authority to acquire ships[9] but not corporate stock, (b) the authority to extend indebtedness, and (c) the authority already thought to exist in the Commission and said to have been exercised by other governmental agencies, i. e., the power to protect and preserve collateral for indebtedness.

The specific purpose of Section 207 is so stated in the *Report of the House Committee on Merchant Marine and Fisheries* on the bill amending Section 207, as follows:

> "Section 3. This amends Section 207 of the Merchant Marine Act, 1936. Section 207 of the Act provides that the Commission may enter into such contracts, upon behalf of the United States, as may, in its discretion, be necessary to carry on the activities authorized by this Act, in the same

[9]Discussions about taking over ships in payment of the debt had occurred. Cf. Appendix to this brief, pp. 10-12.

manner that a private corporation may contract within the scope of the authority conferred by its charter.' The amendment adds that it 'may make such disbursements' as may, in its discretion, be necessary, 'to protect, preserve, or improve the collateral held by the Commission to secure indebtedness,' in the same manner as a private corporation. The amendment is designed to make clear a power which it is thought already exists in the Commission, but about which some doubt has been expressed. Under the act, the Maritime Commission has all the general and implied powers of a business corporation. The specific reference to the power of protecting and preserving the collateral mortgages, and so forth, held by the Commission is intended to make certain that the Commission possesses the power to advance or expend funds for the preservation of its collateral where found necessary or advisable. Such power has often been exercised by other Government lending agencies, such as the Reconstruction Finance Corporation. Without such authority, the Commission may find it impossible to protect its mortgage or other interest in vessels, and title to which is in a transitory state, or where vessels are operated by the companies which are financially embarrassed when such vessels, because of accident or otherwise, need to be repaired or salvaged before further operation."

According to a ruling of the Comptroller General, Section 207, as amended, gave no authority to purchase vessels (18 Comp. Gen. 262). The Comptroller General said "that authority evidently was not deemed sufficiently broad to vest in the Commission a general power to purchase vessels even for its own account," and cited the special provision passed by Congress to authorize the Commission to purchase vessels (Section 215). *A fortiori*, Section 207 gave no power to acquire stock except for collateral. The express grant, in Section 215, of the power to buy vessels emphasizes the absence of power to buy stock of

a corporation owning vessels. *Expressio unius est exclusio alterius.*

(c) Nothing in the spirit or preamble of the Act confers the power.

Failing to discover any specific grant of power to purchase, acquire or hold shares of stock in a private corporation except as collateral, petitioners fell back in the courts below upon the general assertion that in this case the acquisition of the shares was incidental to a "comprehensive program for rehabilitating, subsidizing, and maintaining the essential services of a shipping company in furtherance of a Congressional policy for fostering and maintaining an adequate domestic merchant marine"!

But the Merchant Marine Act confers on the Commission no power to initiate or carry out "comprehensive programs"; it says nothing about "rehabilitating" or "maintaining" essential services of a shipping company. The nearest approach to any such subject is the declaration of Congressional policy as a preamble in the first section (Section 101; Title 46 *U.S.C.*, Sec. 1101), which petitioners quote in their brief as one of the "statutes involved." But even that preamble contains nothing resembling the claimed powers.

In any case, a declaration of Congressional policy in a preamble confers no authority or power. Preambles "constitute not enactments of law, but legislative averments by way of inducement to the enactment which follows" (*Carter v. Carter Coal Co.*, 298 U.S. 238, 280); they "do not constitute an exertion of the *will* of Congress which is legislation, but a recital of considerations which in the *opinion* of that body existed and justified the expression of its will in the * * * act" (ibid, p. 290). [Italics are the Court's]. A preamble is no part of the statute; it may aid construction of doubtful or ambiguous provisions, but it cannot enlarge or confer powers. *Yazoo & Missis-*

sippi Valley Railroad Co. v. Thomas, 132 U.S. 174; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418; *In re American States Public Service Co.*, 12 F. Supp. 667, 681.

Having declared its policy, Congress in the Merchant Marine Act of 1936 proceeded to specify the administrative functions of the Commission and to prescribe the authority and the responsibilities which it deemed proper to further the policy which it declared. It did not leave to the Commission the manufacture of such powers as the Commission thought would be desirable in furtherance of that policy.

It is patent from the Act that the Commission was an administrative agency with limited and specified powers. In the Act, Congress conferred upon the Commission a variety of specific powers:—the power to construct vessels, to operate vessels, to grant construction differential subsidies and operating differential subsidies, to lend money and to take security therefor, to subordinate ship mortgages, to construct and repair vessels for government agencies, and, among other powers, to make advances and contracts to protect, preserve or improve collateral. These powers, specifically conferred and delimited, demonstrate that Congress never conferred upon the Commission the broad and unlimited grant of authority which petitioners have claimed, *a power which, had it existed, would have rendered all other powers unnecessary.* Section 207 of the Act authorized the Commission to "enter into such contracts, on behalf of the United States * * * as may, in its discretion, be necessary to carry on the *activities* authorized" by the Act. The authority to enter into contracts necessary to carry on the *activities* authorized is not synonymous with authority to achieve the *ends, objectives* or *policy* of the act. The "activities authorized" are such as are elsewhere expressly stated, i. e., Congress has itself decided what activities should be permitted in order to achieve the proper purposes of the Act. The language quoted was in Sec-

tion 207 as originally enacted, and, if it were susceptible of the construction asked by petitioners, it would have been unnecessary in 1938 to enact Sections 202 and 215 and to amend Section 207.

But it is unnecessary to labor the question. The problem in this case is, to use an expression of Mr. Justice Holmes (*Northern Securities Company v. United States*, 193 U.S. 197 at 401), merely "to read English intelligently," to read in clear language Section 207 of the Merchant Marine Act of 1936, as amended. And, as said in *Addison v. Holly Hill Fruit Products, Inc.*; 322 U.S. 607 at 617:

> "To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another."

Moreover, the reason assigned by petitioners in their brief, in this Court, as the basis of authority to acquire outright title does not even fit within their latitudinarian interpretation of Section 207. In footnote 17, page 33, they say that the Commission had "authority to acquire absolute title to the stock" under a construction of the Act as conferring unlimited power to do whatever was necessary "to foster the development and maintenance of a merchant marine sufficient to carry water-borne commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such commerce," because "such acquisition was the only way to avert the bankruptcy of an essential shipping company and to continue it in operation." This tumescent argument collapses at the end. Bankruptcy of Dollar of Delaware was threatened because the Commission was pressing for further security for payment of the debt and was refusing to grant an operating differential subsidy such as was contemplated by the Merchant Marine Act in lieu

of the former ocean mail contracts. By receiving the stock as additional or substituted collateral for payment of the debt, thereby acquiring control of the management during the period of the indebtedness and of any subsidy, the Commission received full protection, and bankruptcy was also averted. It is difficult to follow the reasoning by which it is argued that it was necessary for the Commission to force the owners of the debtor's stock to give up their ownership to the Commission without one cent of credit upon or reduction of the debt in order to prevent bankruptcy. This matter is discussed at further length at pages 49-55, infra. Furthermore, the argument is tantamount to the amazing claim that by the preamble of the Act Congress has conferred upon the Commission the tremendous power to purchase the stock of any steamship company which it fears may go bankrupt.

3. **The Power Cannot Be Found in Any Other Statute or Source.**

In the courts below the petitioners predicated the Commission's power to purchase upon the argument that there are some circumstances in which it may hold title to stock absolutely, citing cases such as *Nielson v. Lagow*, 12 How. 98. This case is one of a series holding that officers of the United States upon whom devolve duties to collect debts or monies owing to the Government have authority without express legislative grant to take property or a bond or other instrument by way of security for payment of the indebtedness. The basis of these decisions is that denial of the power to take security for a debt owing to the United States according to the usual methods provided by law would deprive the Government of a usual and sometimes necessary means of obtaining payment.[10] See *United States v.*

[10] It is upon the authority of cases such as *Nielson v. Lagow* that the Committee of Congress stated in its report on the 1938 amendment to Section 207 of the *Merchant Marine Act* that the power to protect and preserve the collateral held by the Commission is a power "often exercised by other Government lending agencies" (see discussion at p. 30, supra).

Bradley, 10 Pet. 343, and *United States v. Linn*, 15 Pet. 290. In the *Nielson* case this Court pointed out that the authority thus implied is strictly limited to taking security for a debt. It said (p. 108):

> "the object of any form of conveyance by way of security is not to acquire the dominion and ownership of land, nor even to invest funds therein but simply to obtain payment of the debt secured."

In the instant case, it is respondents who assert that the stock was transferred only as security for the debt, which has since been paid. It is the petitioners who assert that the object and effect of the transaction was to transfer the dominion and ownership of the shares to them.

It might well be that to take collateral implies the power to sell on default and to purchase the property at the foreclosure sale in order to protect and realize upon the collateral. But in the present case there was neither default nor attempt to sell on default. Petitioners also argued below that the Commission did not "purchase" the stock in Dollar of Delaware but acquired it in settlement of a debt in the sense that it released the obligations of two of the respondents as co-obligors or sureties. As we later show, (pp. 43 et seq.), this was only a substitution of collateral. It suffices to say at this juncture (1) that, whatever the consideration may be for an outright transfer of title, such a transfer would still be a purchase and sale, and (2) that debts to the United States must be paid in money (Cf. Title 31 *U.S.C.*, Sec. 198). While Congress has authorized compromise and acceptance of something other than money in settlement of claims due the United States, it has conferred the power to make such arrangements only upon the Secretary of the Treasury (Title 31 *U.S.C.*, Sec. 194) or the Attorney General (*Executive Order*, No. 6166). No such power was ever conferred on the Commission. Certainly no such power can

be found in Section 207 of the *Merchant Marine Act* of 1936, as amended, for the acceptance of property in discharge of an indebtedness cannot be denominated an act of protection, preservation or improvement of collateral.

B. Prohibition of Purchase of the Stock.

This case is not only one of *lack* of legislative authority to make the sort of contract which petitioners claim the agreement of August 15, 1938 to be. It is one where the law enjoined the Commission from making such a contract.

The navigation laws of the United States (Title 46 *U.S.C.*, Sec. 11) permit the registry or enrollment only of vessels belonging wholly to citizens, and the *Merchant Marine Act* of 1936 permits operating differential subsidies to be granted only to citizens (Act, Sec. 602 Title 46 *U.S.C.*, Sec. 1171). The term "citizen" is defined in the law (Title 46 *U.S.C.*, Sec. 1244) as including a "corporation * * * only if it is a citizen of the United States within the meaning of Section 802." That section defines a corporate citizen of the United States as one in which the "controlling interest is owned by citizens of the United States" (Title 46 *U.S.C.*, Sec. 802). The Attorney General has advised, in connection with this provision, that a corporation, whose stock is held by the United States, is not a citizen of the United States (33 *Opinions Attorney General* 575, 576). The United States is no more one of its own citizens than it is a "person" entitled to sue for damages under the Sherman Act (*United States v. Cooper Corporation*, 312 U.S. 600). While "it is a juristic person in the sense that it can sue upon its contracts or in vindication of its property rights" (*United States v. Cooper Corporation*) and need not give itself express authority to enable it to enforce in its own courts its contract and property rights (*Dugan v. United States*, 3 Wheat. 172, 181), terms

such as "person" do "not include the sovereign, in common usage, nor, ordinarily, when employed in statutes."

Thus the vessels owned by Dollar of Delaware could not be enrolled or registered if the Commission owned the controlling stock. Nor could the Commission then grant any subsidy to the corporation. This is significant, because petitioners have sought to support their power to purchase the stock on the theory that the Commission had general powers to rehabilitate an essential steamship service; that to this end it was necessary to grant a subsidy to the corporation, and that the very purpose of the contract of 1938 was to "qualify" Dollar of Delaware for a grant of operating differential subsidies that under the law could be given only to citizens of the United States as defined in the Merchant Marine Act. Yet, by the very act of such acquisition, the grant of subsidies would have been in violation of positive provisions of the Merchant Marine Act.

The power which petitioners claim in this case is one which would permit them readily to circumvent and defeat the legislative intent expressed in numerous other statutes. Thus, at the very moment when they are challenging the jurisdiction on the ground of sovereign immunity, they assert that they have a power to purchase and acquire in behalf of the United States a controlling interest in a private corporation, a power the exercise of which indirectly permits suit to be maintained and process to be issued against properties which are those of the government. The *Suits in Admiralty Act* (Title 46 *U.S.C.*, Sec. 741, et seq.) prescribes the precise conditions upon which the United States may be sued upon certain causes of action in admiralty and exempts vessels of the United States from process *in rem*. But the Commission, by acquiring the stock in a steamship corporation, instead of ships, would not only expose the assets and property of the government to processes of admiralty but to the processes of federal courts in other actions and of state courts as well.

Furthermore, although the Commission is charged with the responsibility of operating merchant vessels belonging to the United States, the petitioners' contention, if upheld, would permit the Commission to delegate this responsibility and entrust the administration of public property and public funds to private individuals who are not public officials, all by acquiring for the government the shares of a private stock corporation controlled by a directorate of private individuals. When Congress has seen fit to use corporate instrumentalities, it has been quite able to do so, and has done so, by explicit legislation (see *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381 at 390). It did not authorize the Commission to act through corporations, and that power may not be supplied.

C. An Opinion of the Attorney General Shows Lack of Power in the Commission to Take Outright Title.

This Court has said that where the Attorney General construes an act in a given way and the construction is followed by the executive officers charged with administration of the law, Congress will be held to have adopted that construction in the enactment of a subsequent but similar law. *United States v. G. Falk & Brother*, 204 U.S. 143, 150; *Provost v. United States*, 269 U.S. 443, 458; and cf. *H. Hackfield and Co. v. United States*, 197 U.S. 442, 452.[11]

In 1923 the President asked the Attorney General whether the United States Shipping Board, whose authority was to be found in the *Merchant Marine Act of 1920*, could dispose of vessels by incorporating private corporations under state law and

[11]The rationale is similar to the elementary principle that when a statute has been judicially construed and then is re-enacted in substantially similar terms, the legislature is presumed to be familiar with the construction and to have adopted it as part of the law, unless a different construction is expressly required. Cf. *Blake v. McKim*, 103 U.S. 336, 339; *Sewing Machine Companies Case*, 85 U.S. 553, 584; 50 *Am. Jur.* 312.

transferring ships to them in consideration of the issuance of capital stock to the Board. The Attorney General rendered an opinion that it could not. (33 Opinions 575). Among other reasons, the Attorney General stated:

(1) The statute confined sales of ships to citizens of the United States, and, under Section 38, a corporation of which the controlling interest was owned by the United States was not a citizen because "it is impossible to construe the words 'citizen of the United States' as including the United States." This Section 38 later was carried into Title 46 *U.S.C.*, as Section 802 and is the identical section controlling the meaning of "citizen" as used in the Merchant Marine Act of 1936 (see p. 36, supra).

(2) There was no authority for acquisition by the Shipping Board of stock in a private corporation, the Board could only receive cash for its properties (just as we contend that the Commission could not acquire stock in settlement of a debt), the acquisition of stock in a private corporation would subject government property in a variety of ways to state laws, and the administration of that property would pass out of the hands of public officials into private hands.

(3) The power could not be derived from authority to make necessary rules and regulations to carry out the purposes of the act, and the language of Section 1, announcing the national policy to develop and encourage a merchant marine, added nothing to the Board's powers because a preamble cannot enlarge or confer powers.

The special significance of this opinion is that it was extant at the time of the enactment of the *Merchant Marine Act of 1936* and stated with clarity and on cogent reasoning that under a similar act the government agency created to administer it could not acquire stock in a private steamship corporation. Consequently, had Congress in 1936, or by the amendment of 1938, intended to confer that power, it would have done so explicitly.

It would not have left it to be extracted from preambles and policies by modes of argument which the legal adviser of the Executive Department had theretofore said to be unsound in a similar case.

Doubts Expressed by Other Governmental Agencies

In his *Annual Report to Congress for the Fiscal Year ending June 30, 1940*, the Comptroller General said that the Commission's alleged acquisition of the stock here involved was *"under doubtful authority, to say the least."*

This view of an agency of the government having duties and responsibilities relative to use of government funds by the Commission is entitled to consideration in the interpretation of the act. *Adams v. United States*, 319 U.S. 312, 315; *Bowen v. Johnston*, 306 U.S. 19, 29, 30.

General Counsel for the Maritime Commission himself stated in an opinion to the Commission "that a careful study of the Merchant Marine Act of 1936 does not reveal that the Congress contemplated the type of government operation involved in the proposed transaction," speaking of the instant transaction of 1938.[12] While, despite this observation, General Counsel advised the Commission that it could proceed with the transaction, he did so on reasoning that only supports the transaction as a pledge (see discussion at pp. 47-49; infra).

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[12]His entire opinion appears at pages 94-108, and the quoted statement on page 108, of the Commission's Special Report to Congress of April 10, 1939 entitled "Reorganization of American President Lines, Ltd.," a copy of which is Exhibit A-2 to Affidavit of Emory S. Land; the affidavit appears at R. 21. Pursuant to "Stipulation as to Printing of Record" (R. 172), the copy of the Report is not printed in the record. We contend, of course, that Land's affidavit is no proper part of the record on this appeal and that any alleged factual material therein cannot be considered, but reference to the legal opinion of Commission's General Counsel is of a different character.

D. Conclusion:—As a Consequence of Lack of Power of the Commission to Acquire Title Outright to Shares in Private Corporations, the Contract of August 15, 1938 Cannot Be Given Effect as a Contract of Sale and Purchase.

If the contract of August 15, 1938 were construed as petitioners would construe it, it would be unenforceable. It can be given no effect beyond the permissible limits of an hypothecation. We submit that it could not and therefore did not vest in petitioners any right, title or interest other than as collateral.

IV.

SECOND GROUND ON WHICH THE COMPLAINT STATES A CLAIM FOR RELIEF:—AS A MATTER OF CONSTRUCTION, THE CONTRACT OF AUGUST 15, 1938 WAS A SECURITY TRANSACTION SUBSTITUTING A PLEDGE OF STOCK, WHICH GAVE THE CREDITOR CONTROL OF MANAGEMENT, FOR THE PERSONAL OBLIGATION OF CERTAIN SURETIES.

The complaint alleges that the transaction was a security transaction only. It alleges in paragraphs 29 and 30 (R. 6) that

> *"such transfer was in fact and in legal effect collateral security for the indebtedness of the company to the United States Maritime Commission"*

and that

> *"The indebtedness of the company to the United States for which said shares were transferred as collateral, security,* amounted to approximately $7,500,000 in principal amount, all of said amount having been fully satisfied and accordingly the indebtedness *for which the stock has been transferred as collateral* no longer exists."

These allegations must be accepted as true and as controlling until the case is tried, unless the agreement of August 15, 1938, a copy of which is attached to the complaint as Exhibit A, must

as a matter of law be construed as a contract of sale and purchase, that is, unless the exhibit completely and irrefutably demonstrates as a matter of law that our contention cannot possibly be true.[13] This it does not do, and actually the contract itself sustains the allegation of a pledge.

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[13]In footnote 16 on page 32 of petitioners' brief in this Court, it is asserted that the allegations of the complaint quoted above are "conclusions of law" and, therefore not admitted as true by a motion to dismiss. Even before the adoption of Federal Rules of Civil Procedure, this argument would have been unsound, for the allegations are not conclusions of law but of ultimate fact. If a copy of the contract had not been attached to the complaint, petitioners would not even attempt to claim that an allegation that at a given date plaintiffs pledged to defendants certain property to secure a certain debt was not an allegation of fact, and such an allegation, coupled with allegations that the debt had been paid and that defendants refused to return the property, would clearly have constituted a good complaint. Doubtless an allegation of ultimate fact would succumb if specific facts were also pleaded which conclusively demonstrated that the allegation was erroneous. The matter is therefore precisely as stated above, viz., the quoted allegations of the complaint must be accepted as true unless the copy of the agreement attached as an exhibit completely and irrefutably demonstrates as a matter of law that they cannot possibly be true. The unsoundness of petitioners' argument is even clearer under the present Rules of Civil Procedure. The distinction between "conclusions of law" and "ultimate fact" is such a fruitless and often impossible one that the Rules have swept it aside. Cf. discussion in 1 *Moore Federal Practice*, pp. 546-553. There Moore states (p. 553):

> "And the Federal Rules have avoided one of the sore spots of code pleading. The federal courts are not hampered by the morass of decisions as to whether a particular allegation is one of fact, evidence, or law."

The Rules do not even require that "facts" be pleaded. Rule 8(a) prescribes merely that the complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." And see cases cited in *Moore's 1945 Cumulative Supplement* at pages 209 to 211, inclusive. We also call attention to the principles of pleading discussed at pages 20-21, supra.

If it is not the case that the transaction here was a mere substitution of collateral, the harsh injustice is worked that the creditor has been paid its debt in full and yet remains the owner of 92% of the voting stock of the debtor which it received only because of the debt, all to the utter deprivation of the former owners. That construction works a forfeiture, and it is elementary that "the construction which avoids forfeiture *must* be made if it is at all possible" (*Ballard v. MacCallum*, 15 Cal 2d 439, 444, 101 Pac. 2d 692), or "unless no other interpretation is reasonably possible." As *Williston* states (3 *Williston on Contracts*, Rev. Ed. pp. 1786; 1787), "An interpretation which makes the contract or agreement fair and reasonable will be preferred to one which leads to harsh and inequitable results. Therefore, an interpretation of a contract or agreement which would lead to a forfeiture will not be favored."

The transaction, we submit, was a substitution of collateral. The entire debt of Dollar of Delaware was secured by ship mortgages; a part of it was secured in two ways, (1) by the ship mortgages, and (2) by the personal obligation of two of the stockholders, R. Stanley Dollar and Dollar of California as accommodation makers, endorsers and guarantors of ship mortgage notes. The essence of a transaction whereby one becomes an accommodation maker, endorser or guarantor of a note is that he lends his general credit to another (*Uniform Negotiable Instruments Act*, Sec. 29; *California Civil Code*, Sec. 3110). By the contract of August 1938, the personal obligation of the two stockholders was withdrawn, and there was substituted in its place their stock and the stock of the others, thereby giving voting control and control of the management, without necessity of foreclosure, judgments, executions and the like. Since the general credit of two respondents, R. Stanley Dollar and Dollar of California, had been given as security, that which was substituted must be deemed by equity to retain the same character.

A. Any Conveyance, However Absolute It Seems to Be on Its Face, May Be Deemed a Mortgage or a Transfer as Security.

However absolute on its face a conveyance appears, it may still be only a mortgage or a transfer as security. In *Cabrera v. American Colonial Bank*, 214 U.S. 224, the defendant was the joint maker of a note secured by a mortgage, just as here respondents are co-makers on certain notes to the Commission which were secured by mortgages on ships on Dollar of Delaware, the principal debtor. In the *Cabrera* case the co-maker subsequently executed a bill of sale of certain property, the document reciting that it was in payment of the note. The District Court found that the bill of sale was taken merely as "additional security." The appellant argued that the bill of sale necessarily had the effect of being a conveyance in payment of the indebtedness by operation of law. The Court affirmed and said (pp. 230-231):—

> "The face of an instrument is not always conclusive of its purpose. * * * In other words, the real transaction is permitted to be proved. This court said in *Peugh v. Davis*, 96 U.S. 332, 336, and repeated it in *Brick v. Brick*, 98 U.S. 516: 'As the equity upon which the court acts in such cases arises from *the real character of the transaction*, any evidence, written or oral, tending to show this is admissible.' The rule which excludes parol testimony, the court further said, has reference to the language used by the parties and does not forbid an inquiry into their object in executing and receiving the instrument. * * * In *Morgan's Assignees v. Strum*, the rule of equity was enforced against the bill of sale of a vessel, though it was enrolled and also insured in the name of the transferee.

In 4 *Pomeroy's Equity Jurisprudence* (5th Ed.), p. 582, Note 16, it is said that "The rule that a deed absolute in form may, as between the parties, be shown to be a mortgage, is too well settled to require the citation of more than a few authorities,"

many of which are there assembled, and, again (p. 583), that "The doctrine of the text is applied under every variety of circumstances where the essential fact exists."

Consequently, even if the contract of August 15, 1938 stated in express terms that it transferred absolute title—and this it does not do—it would not be inconsistent with a security transaction. Therefore it does not impair the force or the truth of the allegations of the complaint. If the contract is susceptible of either construction, respondents are entitled to a trial in order to have the opportunity of proving the allegation that the contract was in fact a pledge.

B. The Contract of August 15, 1938 in Fact Does Not Purport to Be a Sale, but on Its Face It Is More Consistent With Being a Security Transaction Than a Sale.

No part of the contract of August 15, 1938 states that the transfer of title is absolute, purports to be an outright transfer independent of the debt, or denies that it was by way of security. On the other hand there are portions of that agreement which are consistent only with a pledge. We enumerate:—

1. Provisions With Respect to Right of Transferee to Sell.

Paragraph 23(d) (R. 17) of the contract provides that the Commission shall not have "any duty or obligation to continue to hold any of the stock, or any interest in or to any of the stock, of Dollar of Delaware which it may acquire under the terms and provisions hereof or otherwise." It is settled law (3 *Williston on Contracts*, Rev. Ed., Sec. 619, p. 1781) that

> "The court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable * * *."

Professor Williston's statement is quoted with approval in *E. I. du Pont de Nemours & Co. v. Claiborne-Reno Company*, 64 F. 2d 224 (8 Cir.). It is also the law of California. *California Civil Code*, Sec. 1641.[14]

Patently, if the transaction was a sale, the Commission could do what it pleased with the stock so far as any of the other parties to the agreement were concerned, without the necessity of any such provision as that portion of paragraph 23(d) quoted above, and that provision was wholly unnecessary and useless, or is inexplicable.

But if, in fact, the transfer was a substitution of collateral, the clause becomes meaningful:—the pledgee is given the power to sell at any time, but necessarily the proceeds would have to be applied on the debt.[15]

The Court of Appeals in its opinion considered this provision of the contract to be significant, for it said (154 F. 2d 307, 309, 310):—

> "As appellants argue, the terms of the contract seem in some respects to be more consonant with the theory of pledge than that of outright transfer. For example, it was specifically provided that appellees should acquire some 90% of the voting control of the company and have the power to sell the securities acquired. Neither of these conditions would appear necessary if the transfer was intended to be absolute."

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[14] "Effect to be given to every part of contract. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

[15] "Going outside the record, petitioners pointed in the court below to a public offer of sale of the stock made by the Commission in July 1943, and argued that respondents' failure to object somehow created an estoppel. But paragraph 23(d) gave the pledgee power to sell, a power lapsing when the debt was paid subsequent to July 1943. The next time a public offer to sell was made, in 1945, respondents made inquiry whether the debt was paid and, learning that it had been, demanded their stock and upon refusal promptly sued."

2. The Commission's Dominant Purpose Is Revealed as Being to Control the Management to Protect the Debt. That Being the Only Proper Purpose.

The foregoing quotation from the opinion of the Court of Appeals calls attention to another indicium of a security transaction on the face of the contract:—

Paragraphs 3, 4 and 5 of the contract (R. 10, 11) relate to the transfer to the Commission of certain stock subject to a superior pledge and take pains to state that the Commission was to have the voting rights. This fact emphasizes that what the Commission wanted was voting control so that it might control the management of the debtor. Obviously it desired to control the management in order to protect the obligation owing to it and the security of the mortgaged ships. Once the debt was paid, the Commission could have no need for voting control.

To assume that the Commission wanted more and was using its superior position to coerce and extract more is to assign to it motives of greed. The law is reluctant to assign such motives to public officials and prefers to believe that public officials act fairly (*Reynolds v. United States*, 70 F. 2d 39, 41 (7 Cir.)), in good faith and honorably (concurring opinion of Douglas, J. in *Hirabayashi v. United States*, 320 U.S. 81, 106), that they do not use the powers conferred on them arbitrarily (*Douglas v. Noble*, 261 U.S. 165, 170), just as it prefers to believe that they will act in accordance with their legal authority (*Barry v. United States*, 279 U.S. 597, 614; *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 190). Where public officials choose to stultify themselves by taking a position denying all these presumptions of law, the burden on them is indeed heavy.

The fact that the Commission's chief concern was to control the management is demonstrated by paragraphs 7 to 10, inclusive, of the agreement. Dollar of Delaware was being managed by the Robert Dollar Company under a management contract

which had been executed between Dollar of California and The Robert Dollar Company and assigned to Dollar of Delaware. By paragraph 7 (R. 11, 12) this agreement was to be cancelled.

The dominating motive was to control the management, not to acquire title, and it is elementary that contracts are to be construed in the light of the main purpose or object. 3 *Williston on Contracts*, Rev. ed., Sec. 619, p. 1782; *Marx v. American Malting Co.*, 169 Fed. 582, 584 (6 Cir.).

The only legitimate purpose the Commission could have had was to protect the government's investment. But common sense at once tells us that the objective was equally attainable by acquisition of the stock as collateral, which would empower the Commission to control the corporation and its management until the debt was paid. The only difference between acquisition of the stock independent of the debt and acquisition of the stock as collateral is that in the former case the Commission might sell the stock, and thus acquire a windfall, despite payment of the debt. *But this difference is one having no relation to the legitimate objectives of the Commission.*

By certain arguments made in their brief in the Court of Appeals, petitioners have conceded the case on the point now under discussion.[16] They there conceded (p. 39):—

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[16] The Court of Appeals in its opinion (154 F.2d 307 at 310) made a statement (based on matter called to its attention by petitioners, although outside the proper record) which is relevant to the arguments of petitioners referred to above. It said:

> "Further, some of the language used in the Commission's press release of July 6, 1943, tends to illustrate the genuineness of the claim which appellants are asserting. In announcing that it was considering the possibility of bringing about private ownership of the American President Lines the Commission's release said: 'Some of the debts of the Company were covered by debentures and preferred stock, and the Maritime Commission, *to protect its interests* and insure continuation of service, *came into possession* of 80 per cent of the common stock. Although the Commission had full vot-

"Admittedly the Commission desired voting control of Dollar of Delaware; by controlling its management, it might salvage an essential unit in our maritime trade. Concededly, such control might have been secured under a pledge arrangement.

Again they said (p. 26):—

"The transfer of the stock to the Commission gave the Commission control of Dollar of Delaware. With control of the corporation in the Commission, its position as a mortgage creditor was obviously improved and protected. At the very least, the Commission was certainly free to conclude that the control of the company was better security for its creditor position than were the co-obligations of appellants on the company's liability to the Commission."

Could a better description be given of a transaction substituting one kind of collateral for another? Stock, carrying with it voting control, was substituted for the obligation of personal sureties, to secure the debt.

3. Express Provision That the Transfer of the Stock Would Not Reduce the Indebtedness of Dollar of Delaware to Any Extent Whatever.

The surest proof and test that a conveyance or transfer of property is only by way of security, regardless of form, is the continuance of the debt. Most courts consider that circumstance

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ing control, it caused the Company to be operated by a Board of Directors which included representative local interests of San Francisco and former creditors of the concern." (Italics added.) It would thus appear that perhaps the possession acquired by the Commission to protect its 'interests' was, as appellants urge, nothing more than a bargain by which there was a substitution of collateral resulting in strengthening the Commission's position by reason of the management control inextricably bound to the transferred stock. We have no finding or conclusion from the trial court on this basic issue which we believe must be tried." (Italics are the court's)

to be conclusive. 4 *Pomeroy's Equity Jurisprudence,* 5th Ed., states at pages 576, 577:

> "A general criterion, however, has been established by an overwhelming consensus of authorities, which furnishes a sufficient test in the great majority of cases; and whenever the application of this test still leaves a *doubt,* the American courts, from obvious motives of policy, have generally leaned in favor of the mortgage. This criterion is the continued existence of a debt or liability between the parties so that the conveyance is in reality intended as a security for the debt or indemnity against the liability. If there is an indebtedness or liability between the parties, either a debt existing prior to the conveyance, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is still left subsisting, not being discharged or satisfied by the conveyance, * * * then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instruments." (Italics are the author's)

In *Hickox v. Lowe,* 10 Cal. 197 at 206, Mr. Justice Stephen J. Field (later a member of this Court) laid down the same rule:— "the solution of the question * * * depends upon the fact whether this debt was discharged by the conveyance or subsisted afterwards * * * Where there is doubt [whether the debt subsists], Courts of Equity lean in favor of the right of redemption * * *." In *MacNamara v. Culver,* 22 Kan. 661, Mr. Justice Brewer, also later a member of this Court, announced the same rule. *Dickens v. Heston,* 53 Idaho 91, 21 Pac. 2d 905, states that that is the "test." The preponderance of decided cases follows the view that the *continuance of a debtor-creditor relationship* after an instrument of transfer takes effect is the *"decisive test"* that the transaction is a mortgage, or "indelibly stamps" it as such.[17] The *conclusiveness* of the fact is

[17] *Bickel v. Wessinger,* 58 Ore. 28, 113 P. 34, 38; *Fairpow v. Work,* 39 Okla. 734, 136 P. 739; *O'Neill v. Capelle,* 62 Mo. 202; L.R.A. 1916B, 362.

affirmed in numerous other cases,[18] and all courts treat the fact of a continuing obligation as of great and impelling force, the "central fact."[19] "It is manifest that, where no part of the debt is discharged at the time of the conveyance or release, the change in the relationship of the parties is one in name only and not in substance." *Lynch v. Ryan*, 132 Wis. 271, 111 N.W. 707.

What, then, was the situation here? The $7,500,000 debt of the principal debtor, Dollar of Delaware, remained wholly unaffected. The agreement of August 15, 1938 expressly provided that the debt should remain unaltered. Two of the stockholders who transferred their stock to the Commission, R. Stanley Dollar, and Dollar of California, were indebted to the Commission as "makers, co-makers, guarantors or endorsers" of the ship mortgage notes given by Dollar of Delaware (Contract, para. 14, R. 13) and were released on transfer of their stock. But paragraph 14 of the contract (R. 13, 14) prescribes that the release of the co-makers, sureties or endorsers

> "shall not release or in any way impair its [Dollar of Delaware's] obligations under said notes or said mortgages securing the same, nor shall any credits be allowed or given thereon, either as to principal or interest, by reason of the stock transfers or other consideration that may be received by the Commission under the terms and provisions hereof."

The status of R. Stanley Dollar and Dollar of California, prior to the August 1938 contract, by reason of their obligation

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[18] *Montgomery v. Spect*, 55 Cal. 352, 357; *Conant v. Riseborough*, 139 Ill. 383, 28 N.E. 789, 791; *Marshall v. Thompson*, 3 Minn. 137, 39 N.W. 309; *Chance v. Jennings*, 159 Mo. 544, 61 S.W. 177, 180; *Judge v. Reese*, 24 N.J.Eq. 387, 397; *LeComte v. Pennock*, 61 Kan. 330, 59 P. 641.

[19] *Campbell v. Dearborn*, 109 Mass. 130, 143; *Smith v. Becker*, 184 S.W. 943, 192 Mo. App. 597; *Rockwell v. Humphrey*, 57 Wis. 410, 15 N.W. 394.

as "makers, co-makers, guarantors or endorsers" on the ship mortgage notes of Dollar of Delaware, is clear enough. They were jointly liable with Dollar of Delaware on those notes. As between them and Dollar of Delaware they were sureties, but as regards the Commission they were joint obligors. *Uniform Negotiable Instruments Act*, Sec. 29; *California Civil Code*, Sec. 3110 (identical with N.I.A., Sec. 29).[20] The liability was a joint one, not only where these two respondents were co-makers but also where they were accommodation endorsers or guarantors (*Ruby v. West Coast Lumber Co.*, 139 Ore. 388, 10 Pac. 2d 358; *Continental Bank & Trust Co. v. Bouterie*, (La.) 169 So. 812).

Upon principles recognized by the best authorities, *if the transfer of the stock and the release of R. Stanley Dollar and Dollar of California was an outright sale in consideration of the release rather than a mere substitution of one form of collateral for another, then the fair value of the stock should have been applied on the debt of Dollar of Delaware. But the very contrary was expressly provided in the agreement. A fortiori*, the transfer was a substitution of collateral.

It has long been the law, not only that a release of one joint debtor releases the others and that if one joint debtor is released on a transfer of property its value must be applied to reduce the debt of the others, *but also that this rule applies to debts due the United States.* In *United States v. Thompson*, Fed. Cas. No. 16,487 (D.C., E.D. Penn., 1836), custom-house bonds were given to the United States by two joint obligors and judgments subsequently were rendered on them in favor of the United States. Later, one obligor was released by the Secretary of the Treasury upon certain payments and conveyance of tracts of land, under an Act for the relief of insolvent debtors. It was

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[20] And see authorities collected under Section 29 at pages 409, et seq. of 5 *Uniform Laws Annotated*.

held that the other debtor was entitled to have the cash and the value of the realty credited on his obligation, and, had not separate judgments previously been entered, would have been completely released. It was further held that the same law applies when the United States is the creditor as when the creditor is a private party.

The *Restatement of the Law of Contracts*, Section 120, sums up the law on the subject—If one of two or more obligors pays in whole or in part, in the manner provided in his contract, the payment redounds to the credit of all the other obligors, whether the liability is joint, joint and several, or merely several; *and no agreement to the contrary will be given effect.* If, instead of performing in the manner provided in the contract, one obligor either fully or partially satisfies the obligation (as by transferring property in whole or partial satisfaction of an obligation to pay money), again the right of the creditor to proceed against the other obligors is reduced by the value of what was transferred, and if the obligation is joint, or joint and several, *no agreement to the contrary is effective.* Such an agreement may be regarded if the liability was merely several, but even then the law will avoid the result if in any way possible.[21]

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[21] Thus in the Comment on Subsection (2), it is said:

"c. *The idea of unity in a joint duty involves the consequence that performance, payment, or accord and satisfaction of the duty of one promisor destroys the duty of all. Similarly partial satisfaction of the duty of one joint promisor satisfies to the same extent the duty of all.*"

And speaking of an agreement that the payment by one shall not reduce the obligation of the others, it is further commented:

"* * * *even such an agreement cannot have this effect if all or part of what was originally promised is given; and* * * * *even where substituted performance is accepted as full or partial satisfaction, all joint or joint and several promisors are discharged to the same extent that any one of them is.*"

The California law is even more specific (see *California Annotations* to Section 120 of the *Restatement*). As the contract was actually made in California, the California law governs. Section 1477 of the *California Civil Code* provides:—

> "A partial performance of an indivisible obligation extinguishes a corresponding portion thereof, if the benefit of such performance is voluntarily retained by the creditor, but not otherwise."

Williston on Contracts (Rev. Ed., Sec. 341, pp. 1008-1011) discusses the subject and clearly favors the view of a *pro tanto* discharge of all debtors even though there be an express agreement to the contrary. He says (p. 1010):—

> "An agreement between the promisee and the released promisor that such payment or performance shall be simply additional and special consideration for the latter's discharge is deemed inoperative under the Restatement if all or part of what was originally promised is given; and even a different consideration, if accepted in full or partial satisfaction of the duty of one, inures, in spite of such an agreement, to the *pro tanto* discharge of other joint or joint and several co-obligors, as contrasted with those merely severally liable."

He adds (p. 1011):—

> "Payments so made are now applied in reduction of the debt and in discharge of the other promisors or obligors by statute in a number of jurisdictions."

And in this connection he cites Section 1474 of the *California Civil Code* as well as Section 3 of the *Uniform Joint Obligations Act*. The *California Civil Code*, Sec. 1474, provides:—

Again, that while, in a case where the obligations are merely several, a settlement may be made with one without diminishing the creditor's claims against the other, nevertheless

> *"Though this is legally possible, an inference should not be drawn that the duty of one promisor only is to be affected, unless circumstances clearly require that conclusion."*

"Performance of an obligation, by one of several persons who are jointly liable under it, extinguishes the liability of all."[22]

4. Lack of Any Adequate Consideration to the Other Stockholders for an Outright Transfer of Their Stock.

Not only is the true character of the transaction as a pledge of stock demonstrated by consideration of the situation from the standpoint of R. Stanley Dollar and Dollar of California, but the same conclusion follows from consideration of the matter from the standpoint of the other respondents.

They had not been indebted to the Commission at all. Patently they received no consideration for the transfer of their stock if an absolute title passed. It is understandable why as stockholders of Dollar of Delaware they would be willing to pledge their stock to secure the debt of their corporation in order to give the debtor time to work out its situation, for it might be able to pay off the debt and thereby the stockholders would protect their investment. But to assume that they were willing to transfer their stock outright, receiving no consideration therefor and without any reduction of the debt of their corporation, is to assume a transaction so contrary to common sense that, if at all possible, the agreement will not be so construed. Cf. *Steir v. Archibald*, 151 Cal. 220, 90 Pac. 536.

The first paragraph of the agreement of August 15, 1938 following the recitals (i.e., the paragraph immediately preceding paragraph No. 1 of the "Adjustment Plan—Dollar Steamship Lines, Inc. Ltd.") recites (R. 9):—

"The parties hereto are interested, directly and indirectly, financially and otherwise, in Dollar of Delaware, and deem

[22]This section was adopted in 1872 and was borrowed from Section 700 of the *New York Civil Code*. And cf. *Yule v. Bishop*, 133 Cal. 574, 65 Pac. 1094. *California Civil Code Section* 1477, quoted above, was adopted in 1872 and was borrowed from Section 703 of the *New York Civil Code*.

"the consummation of the Adjustment Plan respecting said company as hereinafter set forth to be mutually advantageous."

The plan could hardly have been advantageous to those who were giving up their stock absolutely, but clearly it would be advantageous if they were transferring their stock merely as security.

One of the important tests implied by the courts in determining whether a transfer otherwise absolute in form was by way of security is the adequacy of consideration. The question is not whether some technical consideration, sufficient under the law of contracts, may be found—technical detriment to the transferee without any benefit to the transferor might be that—but whether in the eyes of sense and justice adequate compensation for an outright transfer is shown. (*Peugh v. Davis*, 96 U.S. 332; *Russell v. Southard*, 12 How. 139; *Conway v. Alexander*, 7 Cranch. 218; *Morris v. Nixon*, 1 How. 118).

In *Villa v. Rodriguez*, 12 Wall. 323, a leading case, a parcel of land was owned jointly by a widow and seven children. The widow and several of the children had given a note and mortgage of their interest to Rodriguez. Later the widow and all the children deeded the property to Rodriguez, who claimed the property was conveyed to him in payment of the debt. The court held that it was still "only security for the debt. This explains the transaction as to those who were not parties to the note and mortgage. There is no other way of accounting for their conduct." (p. 341). "The consideration of the conveyance by the four children not parties to the note and mortgage was such that if an absolute title passed, their deeds must be regarded as deeds of gift of their shares of a valuable estate". (p. 340).

C. Facts and Circumstances Outside the Face of the Contract but Revealed by the Complaint Demonstrate That the Contract Worked No More Than a Pledge as Substitution of Collateral and Support the Allegations of the Complaint to That Effect, Under Settled Principles of Equity and Law.

We have thus seen that the contract on its face supports the allegation of the complaint that the stock was only pledged. Moreover, since evidence outside the instrument is always admissible to determine whether a transaction is an absolute transfer or a mortgage, pledge, or other security transaction (see pp. 44-45, supra, and pp. 59-70, infra), we may note that extrinsic circumstances revealed by the complaint and the applicable legal and equitable principles demonstrate that the 1938 transaction was a mere substitution of collateral and that the defense on the merits is hollow and, indeed, censurable.

1. Summary Statement of Controlling Principles and of the Facts.

(a) Equity jealously protects the debtor and looks to the essential nature of the transaction irrespective of expressed or even conscious intention.

(b) When courts speak of the *real intention* or *real transaction* of the parties, they do not limit themselves to any conscious or verbally expressed state of mind—they do not even care what the parties may have believed was the legal consequence of the transfer—but they allude to the essential nature of the transaction in the light of principles of equity.

(c) Equity will not permit the equity of redemption to be destroyed or "clogged," or relinquished or conveyed to the creditor.

(d) The surest proof and test that a conveyance is still by way of security is that the debt continues to remain.

(e) Where once a debtor-creditor relationship exists, i.e., when the relationship of parties to each other begins as a debtor-creditor relationship, equity will presume that it so continues, subject only to the strongest possible countervailing proof.

(f) Where negotiations between a debtor and creditor begin in demands for, or as discussions concerning, giving of security or better security than already possessed, and end in a transfer of property, the strong presumption is that the transaction concluded just as the negotiations began—as a security transaction.

(g) Where the creditor is in a position of strength and the debtor in a position of weakness, equity is particularly insistent that the original character of the relationship of the parties be not converted into a deprivation and forfeiture of the debtor's title.

(h) Where, too, the creditor's representatives deliberately, consciously and avowedly sought to take advantage of the debtor's necessities, no doubt that the transaction is in essence a security transaction is permissible.

(i) Equity will not construe a transaction between debtor and creditor in such a way that the creditor not only is paid the debt but in addition ends up as the owner of the debtor's property.

The application to this case of the foregoing principles is plain. The relation between Dollar of Delaware and its stockholders, the respondents, on the one hand, and the Maritime Commission, on the other, clearly started as a debtor-creditor relation. The principal debtor was Dollar of Delaware. Its debt to the Commission was secured by two different types of security, including the personal obligation of two of its stockholders as sureties.

The Maritime Commission began to impose pressure of hydraulic immensity upon the debtor and the sureties, and it forced the debtor and the sureties "to yield to the exertion of its power" (cf. language of Professor Pomeroy, quoted at p. 61, infra). We need only refer to the allegations of paragraphs 12 to 23 of the complaint, as well as paragraphs 26 and 27. Driven by the threat of bankruptcy of the principal

debtor and the harassment of the two sureties, the respondents were compelled to deliver their stock to the Maritime Commission. In exchange two of them received back their personal obligation. The other respondents had given no personal obligation and yet transferred their stock as well, receiving nothing at all. The debt has since been paid and if the transfer is treated as a purchase and sale, the creditor has been paid in full in cash and yet remains the owner of 92% of the capital stock of the debtor which it received only because of the debt.

A large body of evidence supporting the complaint will be introduced at the trial, some of it being admissions by petitioners and their predecessors as we show by a summary attached to this brief as an Appendix; the nature of that appendix is explained at page 116, below.

2. Discussion of the Authorities Supporting the Foregoing Principles.

The principle that evidence dehors the instrument is always admissible in determining whether a transfer is absolute or by way of security (*Cabrera v. American Colonial Bank*, 214 U.S. 224; *Russell v. Southard*, 12 How. 139) has nothing to do with rules respecting admission of parol evidence to determine the parties' intention in construing an instrument, on the basis of ambiguity, mistake, or the like. It rests on a different basis. (*Pierce v. Robinson*, 13 Cal. 116, approved in *Peugh v. Davis*, 96 U.S. 332 and *Brick v. Brick*, 98 U.S. 514). The courts go behind what the parties may believe they have accomplished to the essential nature of the transaction.

Thus Professor Williston (3 *Williston on Contracts*, Rev. Ed., Sec. 771, pp. 2171, et seq.) points out that originally mortgages were absolute conveyances and intended by the parties to be such, but that nevertheless equity insisted on creating and pro-

tecting an equity of redemption. Equity originally, and later courts of law, "defied the literal meaning of a mortgage."

> "*These results have not been reached by searching for the intention of parties either actual or expressed.* * * * when courts of equity first established their doctrines in regard to the matter, the expressed intention was doubtless the real intention, yet the intention was disregarded. * * * The maxim, 'Once a mortgage, always a mortgage,' will be applied and redemption allowed. The same principle has been followed in mortgages *and pledges of personal property.* The mortgagor may indeed sell his equity of redemption to the mortgagee, *but in considering the validity of such a sale 'principles almost as stern are applied as those which govern where a sale by a cestui que trust to his trustee is drawn in question.'* Even though a conveyance made as security for a debt is in terms absolute, and there is no written agreement for a reconveyance or for revesting of title in the grantor, equity will allow redemption of the property if the transaction is clearly proved to be a mortgage."

Pomeroy states (4 *Pomeroy's Equity Jurisprudence,* Sec. 1193, p. 568):—

> "In general, all persons able to contract are permitted to determine and control their own legal relations by any agreements which are not illegal, or opposed to good morals or to public policy; but the mortgage forms a marked exception to this principle. The doctrine has been firmly established from an early day that *when the character of a mortgage has attached at the commencement of the transaction, so that the instrument, whatever be its form, is regarded in equity as a mortgage, that character of mortgage must and will always continue. If the instrument is in its essence a mortgage, the parties cannot by any stipulations, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging* to a mortgage in equity.

And on p. 570 Pomeroy states:—

> "*This doctrine* is based upon the relative situation of the debtor and the creditor; it *recognizes the fact that the creditor necessarily has a power over his debtor which may be exercised inequitably; that the debtor is liable to yield to the exertion of such power; and that it protects the debtor absolutely from the consequences of his inferiority, and of his own acts done through infirmity of will.* The doctrine is universal in its application, and underlies many special rules of equity."

In a footnote on page 568 Pomeroy states:—

> "*A court of equity will look beyond the external form, at the real relations between the parties, and will protect the debtor's equity of redemption, if necessary in opposition to the literal terms of the instrument. This principle lies at the base of the entire equitable doctrine,* and is applied to mortgages in the ordinary form, to deeds with a separate defeasance, to deeds absolute on their face, to deeds with accompanying agreements to reconvey, and to every other form of assurance which is in reality a security."

In *Russell v. Southard*, supra, this Court held that a conveyance absolute in form was a mortgage although (p. 156) the grantor "believed his right to redeem was probably extinguished."

> "It is true Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of the parties. 'Necessitous men,' says the Lord Chancellor, in *Vernon v. Bethell*, 2 Eden, 113, 'are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them.'" [p. 152]

In the oft-cited case of *Villa v. Rodriguez*, 12 Wall. 323, this Court said (at p. 339): "That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence." This Court also said, in *Russell v. Southard*, supra:

> "In respect to the written memorandum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. * * * But it is not to be forgotten, that the same language which truly describes a real sale, may also be employed to cut off the right of redemption, in case of a loan on security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids; and that, in doubtful cases, the court leans to the conclusion that the reality was a mortgage, and not a sale. *Conway v.* Alexander, 7 Cranch. 218; * * *" (p. 451).

In both *Peugh v. Davis*, 96 U.S. 332 and *Brick v. Brick*, 98 U.S. 514, Mr. Justice Field, delivering the opinion of the court, cited the opinion rendered by him in *Pierce v. Robinson*, 13 Cal. 116, when he was a Justice of the Supreme Court of California. In the latter case he expounded the governing principles of equity at length and with great lucidity. Said he (pp. 125-127):—

> "The entire doctrine of equity, in respect to mortgages, has its origin in considerations independent of the terms in which the instruments are drawn * * *.
>
> "*As the equity upon which the Courts act arises from the real character of the transaction*, it is of no consequence in what manner this character is established, whether by deed or other writing, or by parol. Whether the instrument, * * * is to be regarded as a mortgage, depends upon the circumstances under which it was made, and the relations subsisting between the parties. Evidence of these circumstances and relations is admitted, not for the purpose of contradicting or varying the deed, *but to establish an equity superior to its terms.* * * * *it is the settled policy of equity, admitting of no departure, never to permit a security to be*

converted by any contemporaneous agreement into a sale. * * * Unless parol evidence can be admitted, the policy of the law will be constantly evaded. Debtors, under the force of pressing necessities, will submit to almost any exactions for loans of trifling amount, compared with the value of the property, and the equity of redemption will elude the grasp of the Court, and rest in the simple good faith of the creditor. A mortgage * * *, is, in form, a conveyance of a conditional estate, and the assertion of a right to redeem from a forfeiture, involves the same departure from the terms of the instrument, as in the case of an absolute conveyance executed as security. * * * *The equity arises and is asserted, in both cases, upon exactly the same principles, and is enforced without reference to the agreement of the parties, but from the nature of the transaction to which the right attaches, from the policy of the law, as an inseparable incident.*

In *Hodgkins v. Wright*, 127 Cal. 688, 60 Pac. 431, a judgment that a deed absolute in form was not a mortgage was reversed despite the special verdict of an advisory jury finding that the parties did not intend the deed to be a mortgage or security for the indebtedness. The court said (p. 690):—

> "If in fact and in law the instrument is a mortgage, it does not matter that the parties intend and stipulate that it shall be something else, and that, in case of a failure to pay, the title of the mortgagee shall be absolute."

We have already seen (at pp. 49 to 51, supra) that the circumstance that the debt continues after the transfer is either conclusive that the conveyance was as security only, or of overwhelming effect. In *Sutphen v. Cushman*, 35 Ill. 186, 197, the court said:—

> "It is sufficient for us to know that when he took the conveyance on account of a pre-existing indebtedness, without in any manner canceling or discharging it, that equity will regard the deed as a mortgage, whether he so regarded it or not."

An almost identical statement appears in *Le Comte v. Pennock*, 61 Kan. 330, 59 Pac. 641, 643, and in *Lynch v. Ryan*, 132 Wis. 271, 111 N.W. 707, the court said that:

> "It is manifest that, where no part of the debt is discharged at the time of the conveyance or release, the change in the relationship of the parties is one in name only, and not in substance" (111 N.W. at 708).

The fact that the relationship of the parties has started as debtor and creditor or lienor and lienee, or the like, is of tremendous import. The courts watch transactions between mortgagor and mortgagee or between debtor and creditor with solicitude; they jealously give close scrutiny to any alleged outright transfer, and if the matter is in any way in doubt resolve it in favor of a transfer as security. *Peugh v. Davis*, 96 U.S. 332; *Lewis v. Wells*, 85 Fed. 896; *Cassem v. Heustis*, 201 Ill. 208, 66 N.E. 283;[23] *O'Neill v. Capelle*, 62 Mo. 202; *Lynch v. Ryan*, 132 Wis. 271, 111 N.W. 707; 2 *Story on Equity Jurisprudence*, Sec. 1018b and 1019. The fact that the relationship was originally that of debtor and creditor, lienor and lienee, creates a presumption that the character of the relationship has not changed and that transfers to the creditor by the debtor, no matter what the form, are still by way of security only. In a case where there was no pre-existing indebtedness, but a deed is given upon a new passage of money, and the question is whether the money was a loan or payment of purchase price, the burden of proof may be on him who asserts that the deed absolute on

[23] In *Cassem v. Heustis*, supra, the court said (p. 286):

> "A court of equity will never allow the mortgagee to avail himself of his position to obtain an advantage over the mortgagor by securing such an agreement for the vesting of the entire estate in himself. Contracts between the mortgagor and mortgagee for the purchase or extinguishment of the equity of redemption are always regarded with jealousy by courts of equity."

its face is a mortgage. But where the debtor-creditor relationship already exists, where no new money passes, but there is a purported transfer of the debtor's interest in property, the burden lies on him who asserts that the transaction was absolute and not by way of security only, because he is in the position of a trustee seeking an advantage over his beneficiary. In *Simpson v. First National Bank,* 93 Fed. 309 (8 Cir.), the court said (p. 311):—

> "* * * where the relation of debtor and creditor, or of mortgagor and mortgagee exists, and conveyances are made, or property is delivered by the debtor to the creditor, the legal presumption is that the relation continues, and that the transfers were made as further security for the debt."

In *Villa v. Rodriguez,* 12 Wall. (U.S.) 323, this Court stated that in cases where the mortgagee claims that a conveyance has been made to him, "principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question." In *Clarke v. Fast,* 128 Cal. 422, 61 Pac. 72, the court, citing *Peugh v. Davis,* supra, and *Villa v. Rodriguez,* supra said (p. 74):—

> "It appearing from the answer that defendant's interest in the [insurance] policy was, in its inception, that of a mortgagee, the burden rested upon him to show that the subsequent transaction, by which he claims to have become the owner of it, was fair, that no advantage was taken of Clarke's necessities, and that the consideration paid was adequate."

So also *Marshall v. Thompson,* 39 Minn. 187, 39 N.W. 309; *Lynch v. Ryan,* 132 Wis. 271, 111 N.W. 707; *Sutphen v. Cushman,* 35 Ill. 186 at 197.

Where the transaction claimed to be an outright transfer had its inception in an application for a loan, or in negotiations for security, or for more or better security, the transaction which emerges will ordinarily be regarded as of the same character and a claim that there was change to an outright transfer some-

where along the line requires clearest proof. *Jones on Mortgages* (8th ed.), Sec. 317, pp. 394, 395; *Smith v. Doyle*, 46 Ill. 451; *Smith v. Becker*, 192 Mo. App. 597, 184 S.W. 943; *Chance v. Jennings*, 159 Mo. 544, 61 S.W. 177, 181).

Thus, in *Morris v. Nixon*, 1 How. 118, this Court emphasized the fact that (p. 126)[24]

> "The transaction was begun by Morris, with the request of a loan from Nixon, for which he offered a security upon the property, for the management of which, Nixon was his agent. It ended by Morris giving to Nixon a deed for the property, absolute on its face, and also a bond for a loan of $5,000. Unless, then, some proof has been given to show that they *truly* bargained upon another footing, * * * equity will interpret it to be a security for money loaned"

So also *Dickens v. Heston*, 53 Idaho 91, 21 Pac. 2d 905, 909, and *Murray v. Butte-Monitor Tunnel Mining Co.*, 41 Mont. 449, 110 Pac. 497.

In *Marshall v. Thompson*, 39 Minn. 137, 39 N.W. 309, a purported transfer was held to be "a mere substitution of new securities made for the same debt" (39 N.W. at 310).

> "The plaintiff's rights must be determined by the character of the original transaction * * *. Though a mortgagee may purchase the equity of redemption, yet where the relation of mortgagor and mortgagee is once established, the courts scrutinize with great jealousy the acquisition of the equity of redemption by the mortgagee in any other way than by regular foreclosure. *Niggeler v. Maurin*, 34 Minn. 122, 123, 24 N.W. Rep. 369. Any additional conveyances exacted or secured by the mortgagee for his benefit cannot be used to prevent a redemption. They proceed from the same old root, and are subject to the same equity; otherwise hardship and oppression might be practiced upon the

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[24]In *Morris v. Nixon*, when Morris applied for a loan, Nixon clearly declined, and the deed absolute recited that Nixon always wanted to buy the property. Fourteen years later Morris sued to establish the deed as a mortgage. A judgment for the defendant was reversed.

mortgagor.' *Holridge v. Gillespie*, 2 Johns. Ch. 33. The rule is inflexible, 'once a mortgage, always a mortgage.' Nor is it material that the note or personal obligation evidencing the debt is surrendered or canceled, the debt remaining in fact unpaid."

The necessitous condition of the debtor and the overwhelming strength of the creditor almost conclusively establish that an apparent relinquishment of the equity of redemption or apparent transfer of property outright cannot be permitted to operate as such. *Russell v. Southard*, supra, at pp. 153, 154; *Peugh v. Davis*, supra. In the leading case of *Villa v. Rodriguez*, 12 Wall. (U.S.) 323, this Court stated at length the importance of the fact of the unequal bargaining powers of a mortgagee and mortgagor in financial need.

In *Montgomery v. Spect*, 55 Cal. 352, 354, the court said:—

"'But,' as Mr. Justice Gaston says, in *McDonald v. McLeod*, 1 Ired. Eq. 227, 'in examining transactions between borrowers and lenders, and between necessitous men and their creditors, courts of equity, aware of the unequal relation of the parties, and of the facility by which the former may be surprised into improvident arrangements, and of the moral coercion which the latter can exercise over their apparent freedom of action, are particularly attentive to any circumstances tending to show an inconsistency between the form of an act and the intent of the parties, and will take great pains to get at the substance of what was done or intended to be done by them'."

To the same effect, see also *Conway v. Alexander*, 7 Cranch (U.S.) 218; *Morris v. Nixon*, 1 How. 118, 129, 130; *Murray v. Butte-Monitor Tunnel Mining Co.*, supra,[25] *Dickens v. Heston*, supra.

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[25] "If the grantor in a deed absolute in form, but alleged to have been intended as a security, was financially embarrassed at the time of its execution, being sorely pressed for money, and therefore at the mercy of his creditor and unable freely to dictate the terms of the security, this circumstance will be considered as tending to show the intention to create a mortgage." (pp. 499-500)

The fact that a debtor was financially embarrassed at the time of the transfer has been considered important in numerous other cases.[26] In *Lynch v. Ryan*, 132 Wis. 271, 111 N.W. 707, a judgment holding a transfer to be absolute was reversed. The court said (111 N.W. at 708):—

> "Where the relation of mortgagor and mortgagee of real estate has been once established between two parties, and it is claimed that by a subsequent deed of the premises by the mortgagor to the mortgagee the equity of redemption has been extinguished and the mortgagee has become the absolute owner of the premises, it must be clearly shown that the conveyance or release was voluntary on the part of the mortgagor, was based on an adequate consideration, was untainted by fraud, and that no advantage was taken of the debtor's necessities to drive a hard bargain. Such transactions will be closely scrutinized, and, if the proof be clear and satisfactory that the requirements above named have been observed, the transaction will be sustained, otherwise not. In doubtful cases, the courts incline to hold that the mortgage relation still exists. These propositions are very well established."

The foregoing principles are as applicable to personal property as they are to real property and apply to corporate stock issued in the name of the pledgee who claims to be the owner. *Brick v. Brick*, 98 U.S. 514; *Cabrera v. American Colonial Bank*, 214 U.S. 224; *Morgan's Assignees v. Shinn*, 15 Wall. 105; *Clarke v. Fast*, 128 Cal. 422, 425, 61 Pac. 72; *Golden v. Fischer*, 27 Cal. App. 271, 149 Pac. 797; *People v. Robinson*, 107 Cal. App. 211, 290 Pac. 470; *Meyer v. Thomas*, 18 Cal. App. 2d 299, 63 Pac. 2d 1176; *Murray v. Butte-Monitor Tunnel Mining Co.*,

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[26] *Lewis v. Wells*, 85 Fed. 896; *Smith v. Perry*, 155 Ky. 686, 160 S.W. 247; *Dean v. Radford*, 137 Mich. 617, 101 N.W. 598; *Hudkins v. Crim*, 72 W.Va. 418, 78 S.E. 1043; *Brown v. Gaffney*, 28 Ill. 149, 157, 158; *Chance v. Jennings*, 159 Mo. 544, 61 S.W. 177, 181.

41 Mont. 449, 110 Pac. 497; *Hodgson v. Burroughs*, 175 Md. 413, 2 Atl. 2d 407, 413; *Brown v. New York Life Ins. Co.*, 22 F. Supp. 82; *Mount Tivy Winery v. Lewis*, 134 Fed. 2d 120 (9 Cir.); *Western Underwriting & Mortgage Co. v. Valley Bank of Phoenix*, 237 Fed. 45 (9 Cir.); *Chapin v. Tampoorlos*, 325 Ill. App. 219, 59 N.E. 2d 334; *Sullivan v. Lewis*, 170 Wash. 413, 16 Pac. 2d 834; *Manufacturers Trust Co. v. Chris Schroeder & Son Co.*, 224 Wis. 580, 271 N.W. 915.[27]

In *Brown v. New York Life Ins. Co.*, 22 F. Supp. 82, the court held that an assignment of life policies to a bank, purportedly absolute, was a pledge. It said (p. 86):—

> "It would be unreasonable to assume that a bank would engage in the business of dealing, in the first instance, in life insurance policies. The possession of the notes from the insured to the banks raises the presumption that the policies were assigned as collateral security for the payment of the notes. Furthermore, there is no evidence that the banks bought the assignments or paid anything for them, nor was Brown's indebtedness lessened thereby. The transaction had its origin in the fact that Brown was indebted to the bank."

In *Schmitt v. Wright*, 317 Ill. App. 384, 46 N.E.2d 184, the owner of stock of a corporation transferred it to creditors of the corporation. It was held that the transaction was not a "sale" and that the transaction was "a pledge of the plaintiff's stock to secure a debt, giving the defendants as additional security the right to enter into possession and control of the business and properties for the purpose of repaying the debt from the

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[27] To the same effect, *Williams v. Chadwick*, 74 Conn. 252, 50 Atl. 720; *Susman v. Whyard*, 149 N.Y. 127, 43 N.E. 413; *Martin v. Bankers Trust Co.*, 18 Ariz. 55, 156 Pac. 87; *Smith v. Becker*, 192 Mo. App. 597, 184 S.W. 943; *In re American Fibre Reed Co.*, 206 Fed. 309, aff'd as *Home Bond Co. v. McChesney*, 239 U.S. 568; *Union Securities Inc. v. Merchants Trust & Savings Co.*, 205 Ind. 127, 185 N.E. 150.

operations." In *Anderson Bros. Mfg. Co. v. Larson*, 61 N.E. 2d 410 (Ill. App., 1945), it was held that a "collateral holding of stock could not be converted to ownership of the stock without crediting the note evidencing the debt secured with the value of the stock at the time of alleged conversion to ownership."

POINT TWO

THE DISTRICT COURT HAD JURISDICTION

I.

THE SUIT IS NOT ONE AGAINST THE UNITED STATES BUT IS A POSSESSORY ACTION AGAINST CERTAIN INDIVIDUALS, BASED ON THEIR OWN WRONGDOING, FROM WHICH THEY ARE NOT RELIEVED BECAUSE THEY PROFESS TO ACT AS AGENTS FOR ANOTHER.

This is a suit, to recover property claimed by respondents, against individuals who, having possession when the suit was commenced, refused delivery on demand.

The discussion of the nature of the claim set forth in the complaint against the petitioners has been necessitated by the frequent mis-statements and false assumptions underlying petitioners' argument that the suit is one against the United States. Without attempting to catalog every such statement, we may note that petitioners make statements both in the Summary of their argument and repeatedly in their argument to the following effect:—

> "title * * * was validly transferred to the United States, which possession and title the United States still has and claims"; "The United States has, and claims the right to retain, possession and title to the stock * * *"; "the United States lawfully acquired possession of, and title to, the stock"; "The contract contained no limitation on the transfer"; "the United States took title to the stock lawfully, now has possession thereof, has at least documentary title, and claims an absolute title"; "under the contract here in question, respondents transferred whatever title to the stock they had to the United States which, having at least documentary legal title, claims the right itself under the contract here involved to retain it. Respondents do not now have title * * * and the avowed purpose of the present proceeding is to procure the return to respondents of the title * * * with which they have parted"; "respondents admit that the United States lawfully acquired * * * documentary title to, the stock" (Petitioner's Brief, pp. 15, 16, 30, 31, 33, 37, 38).

All such assertions are in gross error, in complete disregard of the complaint and based upon argumentative inference from petitioners' *ex parte* affidavits. Under the allegations of the complaint there was only a pledge. A pledge does not pass title; it passes only a right to possession which ceases when the debt is paid. Since, under the allegations of the complaint, the United States no longer has a right to possession, retention by the members of the Commission is not the act of the United States but the unauthorized act of individuals. As we have already seen (p. 12, supra), the United States itself has never, since the debt was paid, asserted title or any right to possession.

Petitioners also assert that, after respondents' stock certificates had been endorsed in blank and delivered in 1938, the certificates were transferred on the corporate books into the name of the Commission. There is nothing in the complaint or even in the affidavits to support the assertion, but, true or false, it is irrelevant. The situation alleged in the complaint is the same as if the contract of 1938 stated in express and unequivocal language that the stock was pledged to secure the debt, and the certificates were then endorsed in blank and delivered. Such endorsement and delivery is customary procedure when shares are pledged, and the pledgee frequently has the stock transferred to his own name so that he may vote it. He does not thereby become the owner.

The present action is not one to set aside a contract for mistake or fraud or to reform it. It seeks merely to enforce the real transaction of the parties (see pp. 57-70, supra). The arguments of the petitioners amount to the bald contention that in any case where a citizen is indebted to a government agency and makes an avowed pledge of property to secure the debt, nevertheless, if the government agents who have custody of the pledged property assert that it belongs to the United States and refuse to surrender it when the debt is paid, there is no means by which the citizen may have his day in court.

With these preliminary observations, we proceed directly to the argument.

A. For Jurisdictional Purposes the Allegations of the Complaint Are Taken as True.

In passing on the jurisdictional question raised here, a first principle is that the complaint is accepted at face value. The question is whether the court has jurisdiction of the particular claim for relief presented by the complaint. The court is "obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents might be able to prove" the allegations of their complaint. *Ickes v. Fox*, 300 U.S. 82, 96. They are deemed established for the purposes of jurisdiction until opportunity is had to prove them at the trial. *Philadelphia Company v. Stimson*, 223 U.S. 605; *United States v. Lee*, 106 U.S. 196, 219; *Magruder v. Belle Fourche Valley Water Users Ass'n.*, 219 Fed. 72, 78 (8 Cir.). This is always true of factual claims, but it is also true of legal assertions unless patently frivolous. *Mine Safety Co. v. Forrestal*, 326 U.S. 371 so holds:[28]—"if we assume, *as we must for the purpose of disposing of the jurisdictional issue*, that appellants' allegations including the one *that the Renegotiation Act is unconstitutional*, are true * * *" (p. 374).

Consequently, it must be taken that the 1938 transaction was only a pledge, that the lien was discharged when the debt was

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[28]Petitioners cite this case to support their criticism of the Court of Appeals for holding that "the jurisdictional and substantive questions are so interwoven that it is necessary to determine the merits in order to resolve the jurisdictional issue," petitioners arguing that in the *Forrestal* case this Court held that "jurisdictional and substantive issues were * * * distinct." That case held that a claim must be accepted for what it is stated to be in the complaint; there the claim on its face was one against the United States (see pp. 99, 100, infra) and it was unnecessary to go further. But where denial of the jurisdiction involves denial of the truth of the claim, then jurisdiction becomes interwoven with the merits, as here.

paid, and respondents, the owners, were entitled to the return of the possession from petitioners, the individuals who then had custody of the shares.

This alone is sufficient to sustain the jurisdiction. But it must also be taken as true that the law conferred no power on the Commission to acquire title to corporate stock outright; the court has jurisdiction to determine the legal issue presented by the allegations of the complaint that the officials acted without legal authority; that very allegation makes the case not one against the United States. *Northern Pacific Ry. Co. v. North Dakota*, 250 U.S. 135, 152.

B. Judgment in This Case Will Not Be Res Judicata With Respect to the United States.

The second important rule, in passing on the jurisdiction, is that, since no judgment against the United States is sought, no decision in the case will be *res judicata* with respect to the title of the United States but will only conclude the rights of the parties *inter se*. *United States v. Lee*, 106 U.S. 196, 217, 222; *Tindal v. Wesley*, 167 U.S. 204, 223; *Blondet v. Hadley*, 144 F.2d 370 (1 Cir.). Thus, in *United States v. Lee*, the Court said (at p. 222):—

> "Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, * * * the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the

United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution."

Of course, if the United States were to assert a claim, respondents would have their day in court. By raising the spurious jurisdictional question petitioners are actually seeking to deprive respondents of a day in court.

C. Respondents' Rights Are Possessory and Not Based on Contract With the United States or Title Claimed to Be Derived From the United States.

The fundamental starting point of the case is that respondents' rights are possessory, based on their ownership, and are not contractual in origin. In other words, respondents admittedly had title, that title was not derived from the United States and rested on no contract with the United States, and *they still have title unless, as petitioners claim, they lost it* by virtue of the transaction of 1938.

The right of the owner of pledged property to its return upon discharge of the debt does not originate in contract but is proprietary. An action to vindicate those rights is not contractual. While the common law forms of actions are gone, a review of the common law will show the essential nature of respondents' rights in the present case and will demonstrate that respondents do not rest upon any contract with the United States but upon the right "to recover under general law possession of specific property * * * wrongfully * * * held." *Great Northern Ins. Co. v. Redd*, 322 U.S. 47, 50.

At common law an action to vindicate the right of the pledgor to the return of his property upon payment of the debt sounded in tort, being an action in replevin, or trover and conversion, or trespass. A pledge does not pass title to the pledgee; the title and general property remain in the pledgor, and the pledgee receives merely a lien or "special property" entitling him to hold possession until the debt is paid. The duty to return does not arise from the contract of pledge but from the fact that that contract has terminated and with it any right to hold the possession contrary to the rights of the owner. *Tracy v. Stock Assurance Bureau*, 132 Cal. App. 573, 579; 23 Pac. (2d) 41; *Mount Tivy Winery v. Lewis*, 42 F. Supp. 636, 641 (D.C. Cal.); *Story on Bailments* (9th ed.), Sections 287, 345; 4 *Pomeroy's Equity Jurisprudence* (5th ed.), Sec. 1229, p. 685; 41 *Am. Jur.* Sec. 27, p. 603; *Cross v. Eureka Lake, etc. Canal Co.*, 73 Cal. 302, 306, 14 Pac. 885; *McLeod v. Bank of St. Louis*, 122 U.S. 528, 533; *Brown v. New York Life Ins. Co.*, 22 F. Supp. 82, 89; *Hodgson v. Burroughs*, 175 Md. 413, 2 Atl. 2d 407, 413.

When the debt is paid and the pledgee refuses to redeliver the pledge, "the special property which he has in it is determined, and he is henceforth treated as a wrongdoer and the pawn is at his sole risk." *Story on Bailments* (9th ed.), Sec. 341, p. 306. Thus it is pointless to say, as petitioners do, that possession was lawfully obtained. It is now wrongfully withheld, and the withholding after the right to retain possession ceased is a trespass.

If one can say that there is a promise to return the pledged article when the debt is paid, such a promise is one implied solely by law from the unlawful withholding (*Story*, Sec. 339, p. 303), and the duty to return will be enforced where no actual promise is made and despite an express provision to the contrary (*Story*, Sec. 345, pp. 308, 309; *Willcox v. Edwards*, 162 Cal. 455, 470, 123 P. 276), as is evidenced by the fact that the law, in the

circumstances discussed at pages 59-70, supra, treats and enforces a contract as a pledge despite express provisions that it shall be an outright transfer (cf. *Brown v. New York Life Ins. Co.*, 22 F. Supp. 82, 86).

The duty to return pledged property after payment of the debt is such that "the pledgee must surrender the pledge or stand liable for conversion." *Schouler on Personal Property* (5th ed.), Sec. 411(a), p. 618; *Story on Bailments* (9th ed.), Sec. 122, p. 129; 1 *Street, Foundations of Legal Liability*, pp. 246, 248, 249.

The pledgor need not resort to equity to compel return of his property after the debt is paid, as he would have to do in a suit for specific performance of a contract. He "may undoubtedly obtain complete relief at law by a tender and by an action to recover the chattel or its value" (4 *Pomeroy's Equity Jur.*, Sec. 1231, p. 688) (although he may resort to equity if other relief is necessary, *Pomeroy*, p. 688, just as here the respondents resorted to equity to enjoin sale and disposition to others). The pledgor may not only sue for conversion, but he may recover the property by an action of replevin, as well as by a bill in equity to redeem: *Restatement of the Law of Security*, Sections 24, 37; *Restatement of the Law of Torts*, Sec. 223, 237; *Latta v. Tutton*, 122 Cal. 279, 280, 283, 54 Pac. 844; *Meyer v. Thomas*, 18 C.A. 2d 299; 63 Pac. 2d 1176; *Chapin v. Tampoorlos*, 325 Ill. App. 219, 59 N. E. 2d 334; *Hodgson v. Burroughs*, 175 Md. 413, 2 Atl. 2d 407, 413; *Murray v. Farmers and Merchants Bank* (Mo. App.), 206 S. W. 577; *Mount Tivy Winery v. Lewis*, 42 F. Supp. 636, 641; *Bumiller v. Bumiller*, 179 Cal. 119, 124, 175 Pac. 897; *Horn v. Klatt*, 65 C. A. 2d 510, 517, 151 Pac. 2d 149; *People v. Tambara*, 192 Cal. 256, 219 Pac. 745;[29] *Coleman v. Fidelity Finance Co.*, 18 La.

[29] This case holds that the pledgee in such a case is guilty of embezzlement, which would not be the situation if the obligation to return was only contractual.

App. 422, 137 So. 584. The very fact that there is liability for conversion shows that the duty to return is not contractual, for conversion does not arise from breach of contract but from interference with dominion incident to ownership (1 *Street, Foundations of Legal Liability*, p. 231), and a mere failure to perform an act obligatory by contract will not constitute a conversion. *Williams v. International Harvester Co.*, 172 Ore. 270, 141 Pac. 2d 837, 841; *Restatement of the Law of Torts*, Sec. 224, Comment a.

D. Petitioners Are Personally Accountable and Suable, and the Fact That They Claim to Act as Agents of Another Is No Defense.

Thus, one who unlawfully refuses to surrender possession, after the debt is paid, has converted the pledge, is personally liable in damages to the owners, and may be compelled to return the property to the owners and those entitled to its possession (see pp. 76, 77, supra). This is true also of one who, gaining possession lawfully on his own behalf or as servant or agent of another, refuses to surrender on demand to the owner, or who attempts to transfer to others (as the complaint alleges, para. 33, R. 6), or who, being in possession, denies the owner's title. *Restatement of the Law of Torts*, Vol. 4, Sec. 237; *Restatement of the Law of Security*, Sec. 37.

One sued for trespass to, or conversion of, another's property may defend himself by *establishing* at the trial that title and right to possession belong to some one other than the plaintiff. But the fact that a defendant acts as an agent for another or relies on the title of another and claims no personal interest in the property does not exempt him from responding personally. 1 *Street, Foundations of Legal Liability*, pp. 242, 243.

As stated in *Detroit Trust Co. v. First National Bank-Detroit*, 7 F. Supp. 117 at 118:—

"The wrongful detention or withholding of possession of personal property from the owner under a claim of title inconsistent with that of the latter, and denying the right of the owner to his property, is unquestionably a conversion of the same for which an action of trover lies, particularly when such detention occurs after demand for possession of the property has been made by the owner. This is true whether the defendant bases his refusal on his own right, or assumes to act for another.' "

All this is true of government agents. As said in *Sloan Shipyards v. U. S. Fleet Corporation*, 258 U.S. 549, 567 (per Holmes, J.):—"An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts" (citing *United States v. Lee*, 106 U.S. 196). The court continued that it did not matter that the agent was a corporation rather than a single man. No more can it matter that several men are agents as here; for their act each and all must individually answer. As the court continued in the *Sloan* case (pp. 567, 568):—

"The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name."

And where the agent is an officer of the United States, the case comes under the settled rule conveniently stated in *W. A. Ross Const. Co. v. Yearsley*, 103 F. 2d 589 (8 Cir.):—

"The rule is that an officer or agent of the United States may be sued where he has exceeded his authority or acted under an authority not validly conferred; and the exemption of the United States from liability for tort does not protect its officers or agents from personal liability to per-

sons whose rights of property have been wrongfully invaded by them."[30]

What petitioners, as defendants, seek to do here is nothing more than attempt to defend a charge of tortious interference with respondents' right to possession by setting up a better right in another. They defend against the complaint by asserting that the United States has title. *The jurisdictional issue is thus seen to be a spurious one. In order to prevail on the merits, to make out a successful defense,* petitioners must establish that the United States had title. If they establish that fact, plaintiffs lose and defendants prevail,—on the merits, not for lack of jurisdiction. Conversely, if petitioners fail to establish the defense, then by necessary deduction from the premise the suit is one against individuals acting without authority or defense under any law.

II.

THE ASSERTION BY GOVERNMENT AGENTS OF TITLE IN THE UNITED STATES, WHEN PERSONALLY SUED, DOES NOT DEFEAT THE JURISDICTION. THE CASE OF *UNITED STATES V. LEE* IS CONCLUSIVE ON THE SUBJECT, AND RESPONDENTS ARE ENTITLED TO RECOVER POSSESSION.

The position of petitioners consists simply of *a bare assertion* of title or right to possession in the government, and *by that bare assertion* they seek to defeat an action against them as individuals to recover property unlawfully withheld.

That they act wholly without authority in asserting a title to the shares in the United States now that the debt secured by the

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[30] Cf. *Worcester County v. Riley*, 302 U.S. 292, 297:—

"The Eleventh Amendment, which denies to the citizen the right to resort to a federal court to compel or restrain state action, does not preclude suit against a wrongdoer merely because he asserts that his acts are within an official authority which the state does not confer."

collateral has been paid is one of the issues tendered by the complaint. It is an issue that the court has jurisdiction to try. Yet by merely asserting that they did have authority petitioners would oust the court of jurisdiction to try the truth of their claim. In short, they claim the right to veto inquiry into the legal authority of their present actions.

It has long been settled that such a bare assertion does not clothe defendants with sovereign immunity; they may not deprive the court of jurisdiction to determine the propriety of their actions by asserting propriety.

The instant case falls directly within the authority of *United States v. Lee*, 106 U.S. 196, the leading case on the subject and one which has been recognized in numerous decisions. The facts of that case are in every material respect the same as here. The suit was one to recover possession of property which had been in the possession of officers of the government for more than ten years. The defendants claimed sovereign immunity, asserting that the property had been conveyed to the United States by a certificate of sale of a Tax Commissioner acting under public statute and therefore belonged to it; in this case petitioners claim title in the United States under the terms of an agreement. The issue there was the validity of the tax sale. Here it is the effect of the 1938 contract. This Court rejected the attempt of the defendants in the *Lee* case to oust the court's jurisdiction and established the principle that an action against government officials as individuals is not converted into an action against the United States by their assertion that they have the right and authority under the law to take or hold title for the United States. They must prove their authority; if they prove it, they establish their defense on the merits, but the jurisdiction of the court to decide the merits is unimpaired. In the *Lee* case a verdict had gone for the plaintiff and on appeal

> "The counsel for plaintiffs in error and in behalf of the United States assert the proposition, that though it has been

> ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses" (p. 204).

The contention was rejected. Since at the pleading stage the allegations of the complaint are taken as true (see page 73), the question in the present must be considered just as if judgment had gone for plaintiffs on the merits. As said in *United States v. Lee*, at p. 219:—

> "It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration."

Because the arguments advanced by petitioners here are the old well-worn arguments always advanced in like cases and were all answered in the *Lee* case, we take the liberty of quoting somewhat fully. The court said (p. 210):—

> "*The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property.* The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States."

The court held (p. 218):—

> "Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer

that this branch of the defence cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, *as Mr. Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question.* The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

"But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

* * * * * * *

"If such [the defendant's argument] be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

"It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the contro-

versy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen.

"The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the government essential to some of its most important operations, will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations" (p. 221).

It has been repeatedly held since *United States v. Lee* that agents of the government who claim to act for the sovereign in the possession of property must establish its title or right to possession. In *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446, 452, this Court said:—

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.

"In these cases he is not sued as, or because he is, an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." [Italics are the court's].

And again (p. 456):—

"It is no answer for the defendant to say I am an officer of the government and acting under its authority unless he shows the sufficiency of that authority."

As stated in *Correa v. Barbour*, 71 F. 2d 9, 12 (1 Cir.):—

> "It is true that the defendant cannot prove that he was in possession under lawful authority without showing that the United States had good title to the land giving it authority to authorize him to enter and possess the land. But in establishing his authority, the right and title of the United States is not at issue in the suit, but is a mere matter of evidence going to prove the character of the authority under which he holds possession * * *; and, as said in both of the Supreme Court cases above cited, a judgment in favor of the plaintiffs will not conclude the United States as to its title but only determine whether the defendant officer is or is not liable as a trespasser *and should or should not be turned out of possession.* The United States, therefore, is not an indispensable party defendant."

So also, *Tindal v. Wesley*, 167 U.S. 204; *Ickes v. Fox*, 300 U.S. 82; *Morrison v. Work*, 266 U.S. 481; *Philadelphia Co. v. Stimson*, 223 U.S. 605, and numerous other cases.

In *Tindal v. Wesley*, this Court cited *United States v. Lee* as holding that (p. 218)

> "a suit by an individual against individuals to recover the possession of property is not a suit against the United States merely by reason of possession being held by the defendants as agents of the United States and under title asserted to be in the Government"

and it gave appropriate answer to the questions (p. 212):—

> "Can the court, in such an action, decline to inquire whether the plaintiff is in law, entitled to possession, and whether the individual defendants have any right, in law, to withhold possession? And if the court finds, upon due inquiry, that the plaintiff is entitled to possession, and that the assertion by the defendants of right of possession and title in the State is without legal foundation, may it not, as between the plaintiff and the defendants, adjudge that the plaintiff recover possession?

* * * * * * *

> *"And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff"* (p. 222).

In *Philadelphia Company v. Stimson, Secretary of War*, 223 U.S. 605, this Court said (pp. 619, 620):—

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. * * * And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. * * * And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. * * *
>
> "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but *challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.*"

Answer to Petitioners' Attempt to Distinguish the Case of United States vs. Lee.

Petitioners argue (Brief, pp. 43-46) that the *Lee* case is inapplicable on several grounds. But not one is sound. One of the arguments made by petitioners is that a judgment against them in their individual capacities would not give respondents the relief they ask. The assertion is mistaken. In the *Lee* case the plaintiffs recovered possession of the land and the individual defendants were ordered to surrender it, although plaintiffs' title was not

quieted against the United States (cf. 106 U.S. 196 at 197, 221, 222) and the United States was free to sue later to quiet its title, or free to intervene. Precisely the same relief may be granted here. And see *Blondet v. Hadley*, 141 F.2d 370 (1 Cir.), which lucidly illustrates how in such a suit plaintiff may recover possession, leaving title of the United States open to *it* (as distinguished from the defendants) to assert. Claiming to be the owner of land, the plaintiff sued the defendant, an employee of the Department of Agriculture and Supervisor of a National Forest, alleging that the defendant claimed that the land was the property of the United States and further alleging that this claim "is wholly unfounded and without any right or authority." The complaint alleged that defendant had entered on the land, ordered the plaintiff's employees off, cut timber, and committed other acts which, if the plaintiff was the owner, were trespasses. Plaintiff sought two kinds of relief: (1) a declaration that he was the owner and a decree quieting his title; (2) a decree enjoining the defendant from entering upon the land and requiring restoration of possession to the plaintiff. The court held that it had no jurisdiction to grant the first relief, because it would then be passing directly on the title of the United States, but it held that it did have jurisdiction to grant the second relief. It said (p. 372):—

> "In his bill the plaintiff, in addition to asking for an adjudication with respect to title, alleges continuous trespasses on his land by the defendant and asks for relief against them, *and this puts the right to possession in issue.* To be sure, the defendant rests his claim upon the title of the United States and his authority as a federal official, but this does not raise the question of the validity of the title of the United States. What it does raise as the issue is the respective rights of the parties to possession, and the answer to it hinges not upon whether the plaintiff or the defendant has a title good against the world, but whether the plaintiff has shown by a preponderance of the evidence

that his title is relatively better than the one under which the defendant claims. In other words, the question is not which party has an absolutely valid title, but which party has the better one. So a determination of title in the case at bar does not adjudicate title as such, it only adjudicates the relative merits of the respective titles of the litigants, and from this it follows that the United States is not a necessary party. For this reason, as well as upon the authority of earlier cases, a majority of the Supreme Court in United States v. Lee, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171, held that one who claimed to be the owner of land held and occupied by the United States for public uses but under a defective title might maintain an action of ejectment against the person or persons in charge of the property as officers or agents of the government. See Ferris v. Wilbur, 4 Cir., 27 F.2d 262, 263. That is to say, it decided that *a possessory action against a government official in actual occupancy and control of lands claimed by the United States is not an action against the United States but one against the official as an individual even though that official justified his occupation on the ground of his authority and the validity of the title of the United States.*"

In *Smith v. Reeves*, 178 U.S. 436 at 439, this Court said that "*a suit would lie by one person against another person to recover possession of specific property*, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case the settled doctrine is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the State of which he is an officer or agent."

The respondents in the instant case are seeking by this suit to vindicate their possessory rights. We have noted (pp. 75-78, above) that at common law the pledgor may vindicate his rights on refusal of the pledgee to return possession, after payment

of the debt, by actions in trover, trespass or replevin. These were all *possessory* actions, title entering into them only as it bore on the right to possession of the parties to the action. I *Restatement of the Law of Torts*, Chapter 9, Topic 2, Scope Note, and Section 221, Section 222 and Section 223, Comment on Clause g.[31] Conversion arises when "the owner or person having the right to possession has * * * been deprived of dominion over the goods. A withholding of possession under an inconsistent claim of title is sufficient." 3 *Street, Foundations of Legal Liability*, p. 160.[32] Likewise, it is settled that replevin and its statutory derivatives are possessory actions and lie wherever there is either unlawful taking OR *unlawful detention*. Cf. *Stone v. Church*, 16 N.Y.S.2d 512; 46 *Am. Jur.* 21.

Petitioners argue that respondents here will not obtain the relief they desire unless they receive more than possession, and that it is necessary for the respondents to obtain a decree commanding the petitioners in their official capacity to transfer title to the stock. The contention has no merit for several reasons.

In the first place, what the respondents delivered in 1938 was the possession of certificates endorsed in blank. They are entitled to the return of the possession of precisely what they had delivered, namely, certificates endorsed in blank, and petitioners must do what is necessary to place certificates in that condition.[33] If the United States has title to the stock, this act of

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[31]It is said in Clause g—"The unqualified refusal by one in possession of a chattel to surrender it to the person entitled to its immediate possession is, unless privileged, a conversion under the rules stated in Sections 237 to 241."

[32]As said in *Burroughs v. Bayne*, 5 H. & N. 296, conversion is the "detaining of goods so as to deprive the person entitled to possession of them of his dominion over them."

[33]In the case of stock the identical certificates need not be returned but only like certificates. Cf. *Horn v. Klatt*, 65 C.A.2d 510, 516, 151 Pac.2d 149.

transmitting possession of certificates so endorsed will not divest the United States of title or preclude the United States from asserting its title in any appropriate proceeding.

In the second place, if the certificates have been transferred into the Commission's name, and if the petitioners are correct in asserting that they may not be compelled to endorse the certificates now in their possession, this objection would go only to the form and extent of the relief, a matter appropriate for consideration only if the case is tried and the respondents prevail. If endorsement may not be obtained, respondents are entitled to have petitioners hand over possession of the certificates though unendorsed. Respondents will at least be protected against having possession pass into still other hands and thus being dispersed. Whether the respondents would then also be able to obtain a transfer on the corporate books into their own names is of no concern to the petitioners. It is not for the petitioners to contrive to withhold the respondents' property wrongfully upon the ground that respondents will be unable to protect their own rights fully by securing a transfer on the corporate books. If respondents must later litigate with the corporation, they will do so. But one thing is certain:—they are as much entitled to possession of the certificates, regardless of the name in which they stand, as the plaintiff in *United States v. Lee* was entitled to possession of the land, although a deed stood of record in the name of the United States.

In the third place, the petitioners' argument rests upon a fallacy. It assumes that because certificates have been endorsed by respondents or, perhaps, transferred into another's name, respondents have ceased to be the owners, that "title has passed out of them," that in order to vindicate their rights they must "get the title back," and that in order to get the title back they must have the certificates retransferred into their names. Every link in this chain of reasoning is unsound. The certificates are

not the stock but only evidence of the stock. When a pledgor transfers stock certificates into another's name in pledge, he is still the owner[34] and remains so though he does not have the certificates and the stock records do not reveal the fact of his ownership. Thus *California Civil Code*, Section 2888, provides:

> "Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien."

In *Borland v. Nevada Bank*, 99 Cal. 89, 33 Pac. 737, a debtor transferred certain corporate stock into another's name on the books of the corporation. Nevertheless he was held subject to a stockholder's liability for the debts of the corporation, it being held that the transfer was by way of security only. The court said (p. 739):

> "The mere transfer of his property to another does not divest him of his ownership, unless such was his intent, and manifested by suitable acts. If the person to whom the transfer is made is his creditor, his ownership will none the less be retained in the absence of any evidence respecting his motives in making the transfer, * * *. The law will make the inference therefrom that by the transaction they intended to effect that which would be of mutual benefit to each, without causing a loss to either, or giving to either an advantage which would not be presumed to have been within their contemplation. Hence, when a debtor deposits property with his creditor, in the absence of any showing as to the purpose with which the deposit is made or received, it is presumed that it was intended as a collateral security for the debt."

As we have seen (p. 76, supra), as between pledgor and pledgee the general property always remains in the pledgor and

[34] If the rights of third parties purchasing from the pledgee for value and without notice intervene, a different question may arise, but no such problem is here involved.

this is so "notwithstanding an apparent transfer of legal title to the pledgee." *Tracy v. Stock Assurance Bureau*, 132 Cal. App. 573, 579, 23 Pac. (2d) 41, and cases there cited. The same rule is stated in *Sparks v. Caldwell*, 157 Cal. 401, 108 Pac. 276, where a transfer by endorsement and delivery was held to be a pledge.

In *Smith v. Becker*, 192 Mo. App. 597, 184 S.W. 943, the transferee of stock caused it to be placed in his name on the corporate books. The transferor sued the corporation to compel it to issue a certificate to him and to place the stock in his name, and the relief was granted because it was held that the transfer had been in pledge only.[35] Such an action may later be maintained by these respondents against the corporation without making the United States a party (cf. *Virginia Coupon Cases*, 114 U.S. 270, 289; *Davis v. Gray*, 16 Wall. 203, 220).

In the fourth place, petitioners are in error in contending that to require them to endorse certificates would be to require an official act. The endorsement will do no more than effectuate the return of possession and right of enjoyment of the pledged property and will be an incident to the judgment restoring possession. If the Commission had no authority to purchase shares of stock (as we contend, pp. 25 to 40, supra), then to the extent that the Commission acted beyond its power in attempting to do so it did not take title for the United States, and the latter was not the "transferee" at all, because an agent acting beyond his authority does not act for his principal. Officers in the executive department of the government are not the government, save as they act pursuant to law and under

[35] *Brick v. Brick*, 98 U.S. 514, was also a case of transfer of stock on the books of the corporation, and *Murray v. Butte-Monitor Tunnel Company*, 41 Mont. 449, 110 Pac. 497, was a case where certificates were endorsed in blank and delivered, and in each case it was nevertheless held that the transfer was only a pledge. And see also *Golden v. Eischer*, 27 Cal. App. 271, 149 Pac. 797.

authority granted to them. *Virgina Coupon Cases,* 114 U.S. 270, 288, 290; *Magruder v. Belle Fourche Valley Water Users Ass'n.,* 219 Fed. 72 (8 Cir.). In the case last cited the court also said:

> "If the acts of the defendants done and threatened were authorized by law, they might be the acts of the United States against which a court of equity would grant no relief. But if the averments of the complaint are true, and in deciding the question now under consideration they must be assumed to be so, these acts are unauthorized by and contrary to law. They are, therefore, not the acts of the United States, and a suit to enjoin their performance is not a suit against the United States, or a suit to interfere with its property, or a suit to compel specific performance of its contracts" (p. 78).

If the Commission lacked power to acquire outright title, the transfer was void, not voidable (see pages 25-27, supra). It follows that in any action whatever taken by them with respect to the certificates petitioners will not be acting in an official capacity.

Similarly, if the transfer was a pledge as a matter of contractual construction, the United States has no further interest and the petitioners, in returning the pledged property, would not be acting in an official capacity. If they endorse the certificates, they will be performing a purely formal act, a "plain ministerial duty." It is an act which they may therefore be ordered to do without converting the action into one against the United States. *Board of Liquidation v. McComb,* 92 U.S. 531, 541; *Rolston v. Missouri Fund Commissioners,* 120 U.S. 390, 411; *Great Northern Insurance Co. v. Read,* 322 U.S. 47, 51; *Smith v. Reeves,* 178 U.S. 436, 439. In the *Rolston* case, which was cited with approval by this Court both in *Great Northern Insurance Company v. Read,* supra, in 1943, and in *Mine Safety Co. v. Forrestal,* 326 U.S. 371, in 1946, plaintiffs sued to compel the Governor of Missouri and other state officials to execute an assignment

of liens on railroad property under a state law requiring such an assignment when certain payments were made into the State Treasury. The defendants objected that the suit was one against the state and was therefore not maintainable under the Eleventh Amendment. This Court held otherwise, saying (p. 411):

> "The ligitation is with the officer, not the state. The law makes it his duty to assign the liens in question to the trustees when they make a certain payment. The trustees claim they have made this payment. The officer says they have not, and there is no controversy about his duty if they have. * * * If it has been made, the trustees are entitled to their decree."

Thus, even if the duty to endorse the certificates were thought to be a duty required of the petitioners because they are members of the Commission, it is one that they may be ordered to do. In fact, however, the case for respondents is infinitely better. The endorsement of the certificates will not even be the exercise of a duty imposed on them by Congress or by their principals, but it will be in fulfillment of a mere common law duty to return to those entitled to it possession of exactly what they or their predecessors received, a duty imposed by "general law." *Great Northern Insurance Company v. Read*, 322 U.S. 47 at 50.

Petitioners have also sought to distinguish *United States v. Lee* on the ground that there the property was seized by force and violence.[36] The property had been sold under a tax sale

[36]This is probably based on a rhetorical paragraph of the opinion reading thus (p. 219):

> "What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery."

and bought in by the United States, and the issue on the merits was not seizure by force but whether the taxes had been paid. The decision was not bottomed on the fact of seizure by force and violence but on the fact of unlawful detention. As the Court of Appeals said below (154 F.2d at 310, footnote 6):

> "These distinctions, however, are matters of degree. If it should be found upon the trial of the present case that the defendants acted without authority in the first instance, or have by subsequent conduct overreached their statutory authority, their position becomes the same as that of the officials in the Lee case."

Tindal v. Wesley, 167 U.S. 204, is a complete answer to petitioners' present attempt to distinguish the *Lee* case, for there plaintiffs had never been in possession. They had bought the property from the State of South Carolina and sued the Secretary of State, as the custodian, for possession upon his refusal to accept certain script in payment. This Court held that the principles of the *Lee* case applied, and that "the withholding of * * * possession" was the wrong (p. 222).

In *Great Northern Ins. Co. v. Read*, 322 U.S. 47, 50, this Court recognized that an action may be maintained against a government officer "to recover under general law, possession of specific property likewise wrongfully obtained *or held*," citing *United States v. Lee*, among others. Detention after the right to hold has ceased is as much a trespass as an originally wrongful taking of possession.

If the law were otherwise, officers would not only be free to seize and hold property at will, but if a citizen leased a building, rented furniture, or chartered a ship to the government for a limited term, he would be unable to gain a hearing in court if officials in possession refused to surrender at the expiration of the term upon the assertion that the government had title,

and in general citizens would be helpless against irresponsible officials. The law is clear that this is not so.

In conjunction with the contention that the *Lee* case is to be distinguished by the factor of "force and violence," petitioners also argue that there the taking was "without pretense of authority," and that there was "not even a colorable basis for the claim of the United States." The argument is not only pointless, since government agents cannot confer immunity on themselves by pretense of authority, but it is ill-conceived because its facts are in error. The taking in the *Lee* case was clearly under "pretense of authority," for it was under a tax deed, the validity of which turned on a question of fact, the refusal of the tax commissioners to permit the owner to pay the tax before the day of sale. "Color of title" is a technical term referring to possession of land under a deed purporting to convey it where the instrument is either imperfect or there is a defect in the chain of title (15 *C.J.S.* 237). The commonest example of "color of title" is a tax deed apparently valid on its face but in fact ineffective (cf. cases cited in 7 *Words and Phrases* (Per. ed.), pp. 684-686). In both *United States v. Lee*, and *Tindal v. Wesley*, supra, there was clearly "color of title," whereas in the instant case there is not. In the *Lee* case the plaintiffs went behind the deed. In the *Tindal* case the title claimed by plaintiffs came from the state. Here the plaintiffs do not ask to set aside the 1938 transfer but merely rely on the "real transaction" (see discussion at pp. 57-70, and again at p. 72, supra). Petitioners further argue that in the *Lee* case the plaintiff's property was confiscated, but certainly, if the allegations of the complaint here are true, petitioners are seeking to confiscate the respondents' property.

Right to Relief Against All Classes of Petitioners

There are several classes of petitioners:—Raymond S. McKeough, who was a member of the Commission when the action

was brought and still is; Emory S. Land, Edward Macauley, and John M. Carmody, who ceased to be members after the action was brought; and W. W. Smith and Richard Parkhurst, who became members of the Commission thereafter and were made parties by order of this Court on October 14, 1946.

All are liable. Petitioners argue that any judgment against Smith and Parkhurst would be based upon their official position, but that is not the fact. They are liable because they now have possession of respondents' property and withhold it wrongfully, not because they are government agents. The occasion for having possession may be that they have become government agents, but that is true in every case involving the principles of *United States v. Lee.*

Land, Macauley and Carmody are liable, although the extent of the relief against them is different. True, no judgment directing them to surrender possession is possible, but that is because they no longer have possession, not because they are no longer government agents. They are liable in damages and for costs. At a time when each had custody of the plaintiffs' property he refused to surrender it on demand and thereby became guilty of conversion. The fact that one has thereafter ceased to be a member of the Commission does not exonerate him from his personal liability for that wrong. One sued for withholding property of another may not eliminate his responsibility by transferring possession to a third party, as if he were a football player passing the ball to another when tackled. A defendant, called on by proper process to answer a charge of wrongdoing, may not avoid answering by substituting another in his place. The personal liability of these petitioners as individuals cannot be shifted to others without the plaintiffs' consent. *Ex parte La Prade*, 289 U.S. 444; *Gorham Manufacturing Co. v. Wendell*, 261 U.S. 1.

It was the duty of these petitioners to turn over possession to the respondents and not to their successors in office, and it

was the duty of their successors to turn over the possession to the respondents and not to retain it.

The District Court had and has the jurisdiction to proceed on the merits against each and all of the petitioners. The exact scope of the judgment as to each may await the time of judgment and has no bearing on the existence of jurisdiction.

III.

PETITIONERS RELY ON AUTHORITIES PERTAINING TO THREE TYPES OF SITUATIONS, NONE OF WHICH IS HERE INVOLVED.

In support of their contention, petitioners rely on three classes of cases, none of which is remotely relevant. The first class involves cases that in effect are suits for specific performance of a contract by the United States. The second class involves cases where the title to property had been and was admittedly in the United States and where plaintiff sought to compel a conveyance, claiming the right to receive title from the United States under some act of Congress, or otherwise sought to control the disposition of government property. The third class involves suits to recover money from the public treasury.

The present case falls in none of these classes. We consider each class separately:—

A. This Is Not the Equivalent of an Action to Compel Specific Performance of a Contract by the United States.

In cases in the first class the plaintiff had no rights except as they were created by and arose out of a contract between him and the United States. Upon breach or alleged breach of the contract by the United States, plaintiff sued to enjoin the United States official from violating the contract. Such suits were tantamount to an attempt to obtain specific performance by the United States or to collect a debt from it when the

contract was for payment of money. All these, too, were cases where, if plaintiff had a case, he could seek and obtain adequate relief in the Court of Claims, which respondents in this case cannot do (see page 110, infra).

In order to come within the principle of these cases, petitioners argue that where pledged property is unlawfully detained after the debt is paid, a suit for its return is, in effect, one for specific performance of a contract to return the shares upon payment of the debt. Hence, they argue, this is one to compel specific performance of a contract by the United States to return the shares.

The argument is based on a supposition inconsistent with hornbook law. We have already demonstrated that the supposition is wholly false and that respondents' rights are proprietary and possessory and not contractual, and we refer to pages 75 to 78, supra.

The cases cited by petitioners in conjunction with this argument are *Transcontinental & Western Air v. Farley*, 71 F.2d 288; *Boeing Air Transport v. Farley*, 75 F.2d 765; *Wells v. Roper*, 246 U.S. 335; *Mine Safety Co. v. Forrestal*, 326 U.S. 371; *Goldberg v. Daniels*, 231 U.S. 218; *Hagood v. Southern*, 117 U.S. 52; *Shoshone Irrigation District v. Ickes*, 70 F.2d 771; *In Re Ayres*, 123 U.S. 443. The utter inapplicability of these cases is evident from the merest inspection.

In *Mine Safety Co. v. Forrestal*, supra, plaintiff sought to enjoin the Assistant Secretary of the Treasury from directing government disbursing officers to withhold payments to the plaintiff on war contracts on the ground of excessive profits under the Renegotiation Act. Patently, the plaintiff's rights arose solely from the contract with the government. Plaintiff was seeking to enjoin an alleged breach, and no matter how viewed its action was a claim for money due from the government on a contract, over which the Court of Claims has jurisdiction. This Court recognized the validity of the principles upon which we rest in the present case. It said (373-375):—

"Appellant contends that the action seeks to prevent a tort by the Secretary, acting as an individual and not as an officer of the government, consisting of a trespass against appellant's property, and that equitable relief is necessary because appellant has no adequate remedy at law and since it would otherwise suffer irreparable loss. Under our former decisions, *had the factual allegations supported these contentions*, the complaint as filed would, in the absence of any further proceedings, have provided a basis for the equitable relief sought. See e.g., *Philadelphia Company v. Stimson*, 223 U. S. 605, 619-620. For according to these cases, *if we assume, as we must for the purpose of disposing of the jurisdictional issue, that appellant's allegations* including the one that the Renegotiation Act is unconstitutional *are true*, the fact that the Secretary had acted pursuant to the command of that statute would have made no difference. *These cases hold that a public officer can not justify a trespass against a person's property by invoking the command of an unconstitutional statute.* Under such circumstances, the tort becomes the officer's individual responsibility, and the government is not held to have sufficient interest in the controversy to be considered an indispensable party. * * *

"Here, the essential allegations and the relief sought do not make out a threatened trespass against any property in the possession of or belonging to the appellant. * * * The assumption underlying this action is that if the relief prayed for is granted, the government will pay and thus relinquish ownership and possession of the money. In effect, therefore, *this is an indirect effort to collect a debt allegedly owed by the government* in a proceeding to which the government has not consented."

Wells v. Roper, 246 U.S. 335, was a suit to enjoin the First Assistant Postmaster General from annulling a contract between the United States and the plaintiff to carry the mails and was therefore nothing more than an action to compel the United States not to violate the contract and to continue to accept services tendered under the contract and to pay compensation

for those services. The two *Farley* cases were similar, arising from cancellation by the Postmaster of contracts to carry air mail. The air lines' suits to enjoin the cancellation were no more than an attempt to obtain specific enforcement against the United States, whereas the remedy was in the Court of Claims for damages for the breach.

Goldberg v. Daniels, 231 U.S. 218, was a petition for mandamus to direct the Secretary of the Navy to deliver to the plaintiff a United States cruiser upon an alleged contract of purchase and sale. The plaintiff's rights, if any, arose entirely from the alleged contract.

The essence of *Hagood v. Southern*, supra, appears in the headnote:—

> "When a suit is brought in a court of the United States against officers of a State to enforce performance of a contract made by the State, and the controversy is as to the validity and obligation of the contract, and the only remedy sought is the performance of the contract by the State, and the nominal defendants have no personal interest in the subject matter of the suit, but defend only as representing the State, the State is the real party against whom the relief is sought."

In Re Ayers, supra, is similar, as is *Louisiana v. Jumel*, 107 U.S. 711.

The distinction between this class of cases and the instant case is illustrated by contrasting *Ickes v. Fox*, 300 U.S. 82, which affirmed a decision of the Court of Appeals for the District of Columbia, 85 F. 2d 294, with the decision of the same Court of Appeals in *United States ex rel Shoshone Irrigation District v. Ickes*, 70 F. 2d 771. Both cases arose out of irrigation projects. The *Shoshone* case was a suit for writ of mandamus to compel the Secretary of the Interior to credit the Shoshone Irrigation District with a share of net profits from power plant operations under a contract whereby the district had been engaged to

operate the project for the United States and the latter had agreed, as part of the compensation for the services, to pay a share of the profits. The action was held to be not maintainable, as it was no more than a suit for specific performance of the contract with the United States, or, in other words, a suit to compel payment of the monies which the United States had agreed to pay for services rendered. *Ickes v. Fox* was an action to enjoin the enforcement of an order of the Secretary of the Interior which would deprive plaintiffs of the right to certain quantities of water for irrigation. According to the allegations of their complaint, the plaintiffs, by making all stipulated payments to the government and by complying with all obligations to it, had already acquired a vested right to the use of certain amounts of water. It was held that the suit was not against the United States. We quote (p. 96):—

> "The fallacy of the contention is apparent because the thus-far undenied allegations of the bill, as already appears, *demonstrate that respondents have fully discharged all their contractual obligations; that their water-rights have become vested; and that ownership is in them and not in the United States.* The motion to dismiss concedes the truth of these allegations; but even if they were denied, we should still be obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents might be able to prove them. *United States v. Lee*, 106 U. S. 196, 218, 219; cf. *Tindal v. Wesley*, 167 U. S. 204, 21[illegible], et seq. * * *
>
> "The suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessors in office."

B. This Suit Is Not One to Compel the United States to Part With an Admitted Title or to Control Disposition of Property Admittedly Owned by the United States.

The second group of cases relied on by petitioners are cases such as *Oregon v. Hitchcock*, 202 U.S. 60; *Minnesota v. Hitchcock*, 185 U.S. 373; *Naganab v. Hitchcock*, 202 U.S. 473; *Louisiana v. Garfield*, 211 U.S. 70; *Morrison v. Work*, 266 U.S. 481. These are cases where the title to land had been and was admittedly in the United States and where the plaintiff sought to compel a conveyance, claiming the right to receive title under some act of Congress or otherwise sought to control the disposition of government property.

In the instant case the respondents claim no title under any law granting government property to them and rest no title on a contract with the United States. Their claim is that they have title despite the contract. Their title antedated the contract. The contract of pledge has served its purpose, has been exhausted and is functus officio: The contract comes into the case only because it is invoked as a basis of defense by the individual defendants and can serve as such only if construed as they would construe it.

In *Oregon v. Hitchcock*, the State of Oregon claimed that it was entitled to receive from the United States title to certain parts of the public domain under swamp land acts, and it sought to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from patenting the land to Indians. The court said (p. 70):—

> "Again, it must be noticed that the legal title to all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed. * * * So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration, and, until the legal title passes from the Government, inquiry as to equitable rights comes within the cognizance of the Land

Department. Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States."

Louisiana v. Garfield, supra, is identical with *Oregon v. Hitchcock*.

Minnesota v. Hitchcock, supra, was a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from selling certain lands which belonged to the United States, on the ground that the State of Minnesota should receive the lands under certain federal school land acts. The essence of the case was stated thus (p. 387):—

"Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State."

Morrison v. Work involved the question whether the United States held title as trustee for Indians individually or as guardian for the tribe. That it held title was an admitted fact, and the purpose of the suit was to control the manner in which the United States administered its trust. As the court said (p. 486):—

"The case at bar is unlike those in which relief by injunction has been granted against the head of an executive department, or other officer, of the Government to enjoin an official act on the ground that it was not within the authority conferred, or that it was an improper exercise of such authority, or that Congress lacked the power to confer the authority exercised. In those cases the act complained of either involved an invasion or denial of a definite right of the plaintiff, or it operated to cast a cloud upon his property. In some of those cases the defendant would have been liable individually in trespass unless he could justify;

under authority conferred. Morrison and the other Chippewas have no right of that character. *The lands ceded are the property of the United States. It has, confessedly, power to dispose of them.*".

Cunningham v. Macon, etc. Railroad Co., 109 U.S. 446, was a suit against a railroad and the Governor and Treasurer of the State of Georgia to foreclose a second mortgage on the railroad. The State of Georgia had held the first mortgage, had foreclosed, and had bought the railroad at the foreclosure sale. The suit thus sought to foreclose a lien on property admittedly owned by the State, which was therefore a necessary party.

Belknap v. Schild, 161 U.S. 10, was a case of attempt to enjoin use of property admittedly that of the United States.

C. Suits to Recover Money From the Public Treasury Are of No Analogy.

Finally, petitioners argue that "the case is no different from the cases where an attempt is made to reach money in the possession of the Government." (Brief, pp. 16, 42). The cases cited involve attempts to recover public funds from the public treasury. Actions to recover possession of specific property have always been regarded as governed by different principles, the very cases cited by petitioners on this subject[37] so state, and the distinction has often been made (cf. *Virginia Coupon Cases*, 114 U.S. 270, 293. Money is fungible, and once it is commingled with public funds in the Treasury, it ceases to be earmarked. It is equally established, however, that, if funds unlawfully taken

[37] *Smith v. Reeves*, 178 U.S. 436, 439: "This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this Court is that the question of possession does not cease to be a judicial question—as between the parties actually before it—because the defendant asserts or suggests that the right

by a government agent have not passed into the Treasury, an action may be maintained against the agent who has possession to recover the funds, and the suit is not barred on the theory of sovereign immunity. *Atchison, etc. Railway Co. v. O'Connor*, 223 U.S. 280, 287; *United States v. Peters*, 5 Cranch 115; *Osborn v. United States Bank*, 9 Wheat. 737, 741, 842, 858; *Louisiana v. Jumel*, 107 U.S. 711, 720, 724, 726, 727. Thus in *Smith v. Reeves*, 178 U.S. 436, 439, it is observed that there "the action is not to recover specific moneys in the hands of the State Treasurer * * *." In *United States v. Ferguson*, 78 Fed. 103 (2 Cir.), a thief stole money from a post office. Upon his arrest, the arresting officers took money from his person, erroneously believing it to be the stolen funds and turned it over to the postal inspector, who retained custody. The thief assigned the right to recover the impounded funds, and the assignee brought suit against the inspector and was given judgment. It was held that the claim to the money was not one against the United States, that at the time when the assignment was given,

> "the inspector had no authority, under the laws of the United States, or no color of authority, to take into his possession and assume to retain money belonging to Atwood, even though Atwood had stolen an equivalent sum of government moneys from a post office. * * * So long as the money was in the hands of the inspector, or if his superior officer, the postmaster general, there was no claim against the United States, and only one against the officers of the government, who had transcended their authority, and made themselves individually liable for the consequences.

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of possession is in the State of which he is an officer or agent. Lindal v. Wesley, 167 U.S. 204, 221, and authorities there cited."

Great Northern Insurance Co. v. Read, 322 U.S. 47, 50:—"The case * * * is plainly distinguishable from those * * * to recover under general law possession of specific property * * * unlawfully obtained or held."

IV.

DOCTRINE OF SOVEREIGN IMMUNITY HAS LONG BEEN N DISFAVOR AND DECAYING AND BY VIRTUE OF STAT-UTES ENACTED BY CONGRESS IN 1946 IS NOW NONEXIS-TENT. IF THIS SUIT COULD NOT THERETOFORE HAVE BEEN MAINTAINED FOR LACK OF CONSENT OF THE SOV-EREIGN DESPITE THE UNLAWFUL WITHHOLDING OF RESPONDENTS' PROPERTY, THE NEW "ADMINISTRATIVE PROCEDURE ACT" HAS CONSTITUTED CONSENT BY CON-GRESS TO THE MAINTENANCE OF THE ACTION.

an enlightening discussion of the subject of sovereign im-y, this Court in *Keifer & Keifer v. Reconstruction Finance oration*, 306 U.S. 381, showed that the legislative policy of ress is in the direction of limiting, not of extending, that nity, and that the present climate of opinion has brought nment immunity into disfavor. In *Federal Housing Admin-ion v. Burr*, 309 U.S. 242 at 245, this Court again referred e "current disfavor of the doctrine of government immunity suit." So also *Cherry Cotton Mills v. United States*, 326 705.

e opinion of the Court of Appeals in this case adverted to ame matter. Petitioners have misconceived the remarks of ourt below on this subject and have sought to present to Court the question whether the Court of Appeals erred in ng that the United States Maritime Commission, as an y of the United States, was a suable entity. Respondents predicated their suit, and the Court of Appeals based its nent, on the principles expressed in *United States v. Lee*, . The reflections of the Court of Appeals on the suability e Commission as such were in connection with its obser-n that the doctrine of sovereign immunity had decayed, cularly where government agencies were engaged in under-gs "commercial and corporate in character." (See R. 167;

154 F.2d 307, 310, second column), and were prefaced by the remark that they did "not alter the basic problem." These remarks of the court were at least prophetic, for less than three months later, on June 11, 1946, Congress enacted the *Administrative Procedure Act*, and on August 2, 1946 it enacted the *Federal Tort Claims Act*. By the *Federal Tort Claims Act* (Public Law 601—79th Congress, Title IV, Section 401, et seq.) Congress consented to suits against the United States on certain tort claims arising after January 1, 1945. The Joint Committee on the Organization of Congress stated, in its Report to the House on the Legislative Reorganization Act of 1945, of which the Federal Tort Claims Act is a part, that "The Government should be put in the same position as any private party." That Report (at pages 35 and 36) contains an historical review of the decay of the doctrine of sovereign immunity, points out that many years ago Congress had consented to suit on contract claims and step by step had consented to suits for patent infringement and maritime torts, and that "the existing exemption in respect to common law torts appears incongruous. Its only justification seems to be historical."

Approximately two months before the enactment of the *Federal Tort Claims Act*, Congress enacted the *Administrative Procedure Act* (Public Law 404—79th Congress, Chapter 324—2d Session), which became effective on September 11, 1946. Not only does that act illustrate the continued decay of the doctrine of sovereign immunity, but, if the present suit is one against the United States, then the act is a consent by the United States to be sued in the present case. We quote in Appendix II the relevant sections of this act.

The *Administrative Procedure Act* provides for judicial review of the actions of all agencies of the United States. Section 10 provides that unless a statute specifically precludes judicial review or commits agency action to agency discretion,

"Any person suffering legal wrong because of any agency

action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Subsection (c) of Section 10 provides that

"Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

Section 2, subsection (g), defines "agency action" as including any "sanction," and subsection (f) of the same section states that "'Sanction' includes * * * (4) destruction, taking, seizure, or *withholding of property*." Subsection (a) of Section 2 defines an agency as meaning every authority of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia.

Thus, it follows that the statute confers upon every citizen the right of judicial recourse against unlawful withholding of property.

Section 10, subsection (b), provides that

"The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction."

The House Report on this Act (House Report No. 1980, May 3, 1946) describes it as setting "forth a simplified statement of judicial review designed to afford a remedy for every legal wrong (Sec. 10)." And see Senate Report No. 752 (79th Congress, 1st Session), at pages 195, 211, 214 of Senate Document No. 248 (79th Congress, 2d Session).

It follows that parties in a like situation to the plaintiffs could maintain an action in the United States District Court for the

District of Columbia against the Commission and its members to obtain the return of property which they claim to be theirs, providing that they have no other adequate remedy. If the instant action is maintainable under the principles of *United States v. Lee*, supra, as we contend, it may be an adequate remedy precluding recourse to the *Administrative Procedure Act*. But if this Court should hold that the action is not maintainable under the principles of the *Lee* case, then there is no remedy outside the *Administrative Procedure Act*.

Respondents obviously have no remedy in the Court of Claims under the *Tucker Act*. Such an action may be maintained only if it sounds in contract—"in cases not sounding in tort." Title 28 *U.S.C.*, Sec. 250; *Pearson v. United States*, 267 U.S. 428; *Klebe v. United States*, 263 U.S. 188. Moreover, only money may be recovered in the Court of Claims, and no judgment may be entered by that court for delivery of possession of property. *Hart v. United States*, 91 Ct. Cl. 308; *United States v. Jones*, 131 U.S. 1; *United States v. Alire*, 6 Wall. 573; *Kirk v. United States*, 131 Fed. 331, aff. 204 U.S. 668.[38]

Likewise, while the *Federal Tort Claims Act* permits suits against the United States on tort claims arising after January 1, 1945, the relief provided for by the Act is expressly stated to be "for money only * * * on account of damage to or loss of property or on account of personal injury or death * * *" etc.

What respondents in the instant case desire, and what they are entitled to have, if they prove the allegations of their complaint, is the return of the property itself.

Patently, a person whose property has been unlawfully and fortiously withheld by a government officer should not be con-

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[38] In the case last cited plaintiff sought to enjoin both the United States and the United States Marshal from unlawful seizure of property. The complaint was dismissed against the United States, but an injunction was issued against the marshal on the authority of *United States v. Lee*, supra.

fined to the recovery of damages. To so hold would be tantamount to ruling that any government officer is empowered by indirection to exercise the power of eminent domain by committing a tortious conversion, thereby divesting the citizen of property and binding the government to pay its value. Thus, by indirection, government agents could do just what Sections 11 and 14 of Title 41 *U.S.C.* expressly forbid them from doing, i.e., make purchases of land and other property for the United States.

It is evident that Congress intended to confer on the public the right to complete redress for wrongs committed by the government or its agents. The absence of mention in the *Federal Tort Claims Act* of tort actions to recover property in kind was not based on a desire to make an exception, in such cases, to the enlightened doctrine. Obviously, the reason that no provision was made in that act for such cases was that, in view of the long existing and well recognized rule of *United States v. Lee*, supra, no such provision was necessary: adequate relief was already available by means of suit against the agent or official of the government as an individual. And moreover, by the *Administrative Procedure Act*, enacted two months earlier, actions for wrongful withholding of property by government agents could be maintained against the agency as such.

It is in the climate of opinion that we have described above that petitioners seek to attach immunity to a suit of a character in which, ever since the *Lee* decision over sixty years ago, it has been settled that there is no immunity and in which they seek to deprive respondents of any remedy whatever for an attempted unlawful confiscation of property. Moreover, it would be an idle act to affirm the dismissal of the present action on the ground of sovereign immunity, when it would only be necessary, under the *Administrative Procedure Act*, for the plaintiffs to file a new action in the same court alleging the identical claim for relief. The law neither does nor requires idle acts.

It is true that the *Administrative Procedure Act* was enacted after the present action was instituted and after the decision of the Court of Appeals. Nevertheless, if the sovereign may not be sued without its consent, and if the present action were to be held to be a suit against the sovereign, this act is consent and validates maintenance of the action. The sovereign, which in the United States acts through Congress, may at any time during the course of an action either grant or revoke consent to be sued (*The Davis*, 10 Wall. 15 at 20; *Cummings v. Deutsche Bank*, 300 U.S. 115; *Lynch v. United States*, 292 U.S. 571), and proceedings in the action thereafter must be governed accordingly. An act extending jurisdiction applies to pending cases (*Larkin v. Saffarans*, 15 Fed. 147). This is equally true when the consent is granted or jurisdiction given while the cause is on appeal, for, if subsequent to a judgment and before decision of the appellate court, a law intervenes and changes the governing rule, the appellate court must apply the new law unless rights of private individuals are unconstitutionally lessened (*United States v. The Peggy*, 5 Cranch 102, 110 (per Marshall, C.J.); *Martin v. Hunter's Lessee*, 1 Wheat 304; *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78; *Watts, Watts & Co. v. Unione Austriaca* etc., 248 U.S. 9, 41). Thus, the decision of the Court of Appeals must be affirmed regardless of whether or not it were deemed erroneous when rendered. (*Pugh v. McCormick*, 14 Wall. 361).

POINT THREE

THE CASE CANNOT PROPERLY BE DISPOSED OF SUMMARILY UPON MATTERS OUTSIDE THE COMPLAINT, EITHER UPON THE MERITS OR THE "JURISDICTION."

Petitioners insist upon referring to the affidavits filed by them below in opposition to plaintiffs' motion for an interlocutory injunction. We have already pointed out that the District Court did not try or decide *any* factual issue, and that it did not base its order of dismissal on the affidavits in any part (see pp. 12 to 16, supra). The only indication given by it of the reason for its order was that it believed that under Section 207 of the *Merchant Marine Act of 1936* the Commission had legal authority to acquire outright title to shares in private corporations; proceeding from this premise alone—a pure conclusion of law—it arrived at its jurisdictional conclusion, without considering or deciding any issue of fact.

This alone disposes of petitioners' attempt to invoke their affidavits. But regardless of what the District Court did or did not do, that attempt cannot be supported.

Petitioners seem to rely on the principles applicable to a "speaking motion to dismiss." Such a motion is treated by the courts which recognize its use as governed by the same principles as a motion for summary judgment.[39]

Although petitioners made no motions of any kind, either to dismiss or for summary judgment, they argue that a court has the same power to act *sua sponte* as it could on such motions. We agree that the District Court could not of its own

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[39] Cf. cases cited in 1 *Moore's Federal Practice*, 1945 Supp., pp. 260-264, and the *"Report of Proposed Amendments to the Rules of Civil Procedure for the District Courts of the United States,"* submitted to this Court by the Advisory Committee under date of June 14, 1946, concerning proposed amendment of Rule 12(b); this report is printed in 5 F.R.D. 436-502.

motion make a disposition of the case that it could not make on a motion for summary judgment. And the dismissal here cannot be supported, either on the merits or the jurisdiction, upon any applicable principle. Petitioners do not contend in this Court that a summary judgment on the merits could be granted, but, since the issue of fact on jurisdiction is identical with that on the merits, we first consider the subject relative to the merits.

I.

NO SUMMARY JUDGMENT COULD HAVE BEEN GRANTED ON THE MERITS BECAUSE OF THE PRESENCE OF A GENUINE ISSUE OF FACT.

A summary judgment may be granted only if it appears that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rules of Civil Procedure*, Rule 56, Subd. (c). On a motion for summary judgment the court may only decide whether there is an issue—it may not decide the issue (see 3 *Moore's Federal Practice*, p. 3184, and the numerous cases cited in the 1945 Pocket Supplement at pages 177-180). Such a motion may not be perverted to the trial of disputed questions of fact upon affidavits; it is no substitute for existing methods of trials of issues of fact. It can only be granted upon evidence which a jury would not be permitted to disbelieve in a jury case and which would require a directed verdict. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620; *Arenas v. United States*, 322 U.S. 419; *United States v. Broderick*, 59 F. Supp. 189; *Bowers v. E. J. Rose Mfg. Co.*, 149 F.2d 612, 615 (9 Cir.); 3 *Moore's Federal Practice*, p. 3184; *Walsh v. Walsh*, 18 Cal. 2d 439, 444, 116 Pac. 2d 62; *Gravenhorst v. Zimmerman*, 236 N.Y. 22, 139 N.E. 766, 772. An affidavit of a defendant denying allegations of a complaint which, if true, make him liable, will not support a summary judgment. *United States v. Broderick*, supra, at 192; *Farrall v. District of Columbia Amateur Athletic Union*, 153 F.2d 647 (C.A. D.C.).

A summary judgment may not be granted where the record discloses any possible basis for a claim in plaintiff (*Veatch v. Standard Oil Co.*, 49 F. Supp. 45), any genuine issue of fact (*Henderson v. Glosser*, 46 F. Supp. 458) or any material issue (*Acadian Production Corp. v. Landé* 136 F.2d 1 (5 Cir.). A plaintiff stating a cause of action cannot be compelled to submit his evidence in the form of affidavits and may ignore affidavits of his adversary. *United States v. Broderick*, supra, at 192.

In the Report of the Advisory Committee on the Rules of Civil Procedure, the Committee said, relative to Rule 12(b):—

> "The Committee emphasizes particularly the fact that the summary judgment rule does not permit a case to be disposed of by judgment on the merits on affidavits, which disclose a conflict on a material issue of fact." (5 F.R.D. 443)

It is apparent that even if it were permissible to resort to the affidavits to determine whether a claim for relief is sufficiently stated to entitle the respondents to a trial, the affidavits do not demonstrate the absence of a genuine issue of fact. It is only necessary (1) to refer to the discussion appearing under Point One of this brief (pp. 20 to 70, supra) concerning the nature of plaintiffs' claim for relief, (2) to note (a) that the contract of August 15, 1938 bears on its face the strongest, if not conclusive, indicia that it was a pledge, (b) that extrinsic evidence is admissible to show that even a transfer absolute in form is only a security transfer, (c) that in transactions between creditor and debtor whereby the debtor transfers property to the creditor, the burden of proof to sustain the transaction as an absolute transfer rests heavily on him who so asserts, and (3) to review the nine principles listed on pages 57, 58, supra, in order to conclude that the items carefully selected by petitioners and stated in their affidavits are either meaningless, pointless, equivocal in significance, or, at the utmost, merely tend to raise an issue of fact.

The Affidavits Come Close to Demanding a Summary Judgment for Respondents.

In fact, certain exhibits attached to the affidavits of petitioner Land come close to demanding a summary judgment for the plaintiffs.

The affidavits themselves are wholly incompetent. Rule 56(e) of the *Rules of Civil Procedure* provides that affidavits submitted in support of a motion for summary judgment "shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The affidavit of Land (R. 21), for example, violates this rule because it is replete with hearsay, conclusions, paraphrase of documents, and statements on information and belief.

But attached to Land's affidavit as Exhibit A-2 is a copy of a Special Report of the Commission to Congress, signed by the petitioner Land, dated April 10, 1939, and entitled "Reorganization of American President Lines, Ltd." Attached as Exhibit A-1 is a copy of a booklet entitled "Financial Readjustments in Dollar Steamship Lines, Ltd." issued by the Commission, dated February 17, 1938. These reports are replete with admissions against interest, the truth stands revealed, and the reports are all the more damning because they were prepared as self-serving, self-justifying and self-laudatory documents. Being self-serving, they cannot be used by the petitioners in support of their defense, but they can be used in evidence by respondents as admissions against interest.

We attach to this brief as an appendix a statement prepared directly from these reports. We not only submit that the facts there revealed demolish any claim that petitioners are entitled to a summary judgment, but we also submit that when these facts are proved at a trial and are compared with the applicable principles discussed at pp. 57, 58, *supra*, a judgment for the plaintiffs will be inevitable.

In summary, these reports demonstrate:

(1) The transfer of the stock of Dollar of Delaware, made pursuant to the agreement of August 15, 1938, was the culmination of negotiations, transactions and events beginning as early as June 30, 1937.

(2) At that time the parties bore to each other the relation of debtor, creditor and surety; Dollar of Delaware was a debtor of the Maritime Commission and the debt was secured in two ways, (a) by mortgage on this debtor's ships, and (b) by the personal obligation of respondents R. Stanley Dollar and Dollar of California as additional security for part of the indebtedness.

(3) The negotiations began, and they proceeded, with the repeated and insistent demand by the Maritime Commission upon the debtor and its stockholders for better security and collateral to secure the indebtedness due from Dollar of Delaware, and the primary insistence of the Commission was upon obtaining the voting and management control of Dollar of Delaware as that security.

(4) At no time in the course of the negotiations was the character of the demands changed or altered from a demand for collateral to a demand for an outright transfer of title and certainly not to a demand for such a transfer without any reduction of the indebtedness.

(5) Throughout the entire period the Maritime Commission, the creditor, occupied a superior position; the debtor, Dollar of Delaware, was in a necessitous and inferior position; and the Commission deliberately, consciously, and avowedly sought to take advantage of the debtor's necessities.

(6) The negotiations culminated as they had begun and as they had proceeded, as pertaining to a security transaction.

We place this statement in an appendix instead of in the body of the brief because, as we submit, resort to the affidavits is wholly improper, since they were filed in opposition to the mo-

tion for an interlocutory injunction and are available for no other purpose.

II.

A DISPOSITION OF THE JURISDICTIONAL ISSUE BY SUMMARY DETERMINATION OF THE FACTS IS NOT PROPER.

Petitioners' argument in the District Court and in the Court of Appeals was that they could deprive the court of jurisdiction to determine the propriety of their conduct by the bare assertion by them of title in the United States. That argument being clearly unsound (see pp. 71 to 106, supra), they urge in this court for the first time a modified argument. They contend that on the so-called "jurisdictional issue" the court may make a summary disposition by trying the facts on their *ex parte* affidavits. *But since the so-called jurisdictional question is identically the same as the merits of the case,* petitioners' request is quixotic because it asks the court to do, under the disguise of jurisdiction, what it cannot do directly, that is, dispose of the merits summarily on affidavits, all for the purpose of denying respondents a full trial in the usual manner of the law. In short, the merits are to be summarily decided against respondents for fear that they will be decided in favor of respondents if tried fully.

It is a semantical vice to confuse unlike matters because they bear similar names, and it is inexact usage to describe the question here involved as a jurisdictional one at all. It is a question of sovereign immunity. It does not involve any question of the "jurisdiction" of a particular court, for, if it is the sovereign that is being sued, no court can act. The question is obviously different from such jurisdictional elements as amount in controversy or citizenship. Thus in *Illinois Central R.R. Co. v. Adams,* 180 U.S. 28, it was said:

> "The question whether this is a suit against the State within the Eleventh Amendment to the Constitution * * * is also one which we think belongs to the merits rather than to the jurisdiction. [p. 37]
>
> * * * * * * * *

"* * * where the suit is against an individual by name, and he desires to plead an exemption by reason of his representative character, he does not raise a question of jurisdiction in its proper sense. As already observed, this question depends upon the language of the statute, *although the word 'jurisdiction' is frequently, and somewhat loosely, used to indicate the right of the plaintiff to sue, or the liability of the defendant to be sued, in a particular case* * * *. [p. 38]

"But whether this be a question of jurisdiction or not, we think it should be raised either by demurrer to the bill, or by other pleadings in the regular progress of the cause. Motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law, or to dispose of the merits of the case * * *. [p. 38]

"* * * The difficulty we find in the case is that the defendant has confused that which is jurisdictional with that which is not, and has attempted to forestall the ultimate action of the court by attacking its jurisdiction upon propositions which belong to the merits." [p. 40].

In *Great Northern Ins. Co. v. Read*, 322 U.S. 47, at 49, and in footnote 2, it is indicated that the question is not one of jurisdiction but is part of the objection that there is no claim for relief alleged or established.

But assuming that the question is a jurisdictional one, there are still four reasons why petitioners' argument is unsound:

1. It is settled that *in the type of jurisdictional question here involved, if it is a jurisdictional question, the allegations of the complaint must be taken as true.* If those allegations sustain the jurisdiction, the jurisdiction is not lost because, forsooth, the allegations may not be proved. We refer to the discussion of the matter at pp. 73, 74, supra.

2. Even if the court were free to go behind the allegations of the complaint, the same rules and the same disposition must

apply to the same issues of fact whether the issues be called "merits" or "jurisdiction."

Petitioners belabor the question of the *power* of a District Court to inquire into jurisdictional questions and to try them preliminarily. But the question of *power* to make such an inquiry is largely irrelevant here. As we read petitioners' discussion, they derive the power from two separate sources: They treat it (1) as power to act as if on a "speaking motion to dismiss" for lack of jurisdiction, and (2) as a power said to be derived from Section 37 of the Judicial Code.

With respect to the power to act as if on a "speaking motion to dismiss," petitioners argue (Brief, footnote 13, p. 25) that while courts have doubted the power to grant speaking motions to dismiss on the merits, they recognize the power to grant such motions for lack of jurisdiction. But the cases cited assimilate that power to the power to grant a motion for summary judgment (cf. *Central Mexico Light & Power Co. v. Munch*, 116 F.2d 85 (2 Cir.)), and therefore the dismissal may be made only if there is no genuine issue of fact and the affidavits raise only a question of law (*Gallup v. Caldwell*, 120 F.2d 90, 93). As we have seen, there is a genuine issue of fact here.

The same result follows if the power is derived from Section 37 of the Judicial Code. The cases cited by petitioners arising under that section all involve a true jurisdictional question, such as citizenship or amount in controversy. We do not believe that the issue under discussion is one of jurisdiction (see authorities cited on pp. 118, 119, supra), or that section 37 has any application to the kind of jurisdictional question here involved even if it can be called a jurisdictional question.[40] But we do not

[40]Section 37 comes directly from the Act of March 3, 1875 (18 Stat. 470) and is part of an act conferring jurisdiction on the Circuit (now the district) courts and therefore pertains to the jurisdictional elements peculiar to such courts. The cases all so treat it (cf. footnote 10 in *St. Paul Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 287).

pursue the matter because, even assuming application of Section 37, it is settled that if a factual inquiry into the jurisdictional question is made before trial, evidence to sustain the jurisdiction on such preliminary inquiry need not be as clear as that to establish the fact on the merits, because a "suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, *create a legal certainty* of that conclusion" (*Wetmore v. Rymer*, 169 U.S. 115 at 128, reversing a judgment of dismissal; *St. Paul Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289).

While Section 37 does not prescribe the manner in which the court shall examine into the jurisdictional facts and leaves the District Judge free to adopt an "appropriate mode," disposition on affidavits is "appropriate" only if they disclose that there is no genuine dispute of material fact. If a question of fact is presented, it should "only be decided upon a hearing had either before the court or by reference to a master." Cf. *Davis v. Schackleford*, 91 F. 2d 148, 150.

The cases cited by petitioners show that under Section 37 courts have referred the factual issue to a master (e.g., *Steigleder v. McQuesten*, 198 U.S. 141) or held a special trial, or tried that issue independently of the jury but at the time of the trial of the merits (e.g., *Gilbert v. David*, 235 U.S. 561). In the leading case on use of affidavits in this Court on jurisdictional matters—*Red River Cattle Co. v. Needham*, 137 U.S. 632, (not cited by petitioners)—where the jurisdictional element was the amount in controversy, this Court said that the issue is to be settled on affidavits only "when the value is not really in dispute" and was not covered by the evidence at the trial more or less accidentally. It said that if there is a real controversy requiring careful weighing of conflicting evidence, the issue should not be settled on *ex parte* statements.

Where a preliminary jurisdictional inquiry reveals that there is a question of fact and that it is identical or intermingled with the merits, a plaintiff is entitled to introduce his evidence at a proper trial and may not be relegated to a contest of ex parte affidavits. In such a case, the only "appropriate" procedure is to try the entire case. A district court, by treating a question of merits as a question of jurisdiction, may not dispose of it summarily. Cf. *Huntington v. Laidley*, 176 U.S. 668, 679; *Illinois Central R.R. Co. v. Adams*, 180 U.S. 28 (see p. 118, supra).

Arguing that the burden of supporting federal jurisdiction rests on the plaintiff, petitioners would deny plaintiffs the opportunity to support, at a trial of the case, whatever burden of proof may rest upon them. It is beside the point to cite cases where the very facts alleged in the complaint negative jurisdiction (e.g., *Oregon v. Hitchcock*, 202 U.S. 60; *Transcontinental & Western Air v. Farley*, 71 F. 2d 288; *Myers v. Bethlehem Corp.*, 303 U.S. 41); or cases where, the action having gone through trial to judgment, there was no evidence and no finding to sustain the traversed jurisdictional allegations of the complaint (e.g., *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178), or cases where there was no dispute as to the facts and it was merely held that the facts stated in plaintiff's own affidavit failed as a matter of law to show jurisdiction (*KVOS, Inc. v. Associated Press*, 299 U.S. 269).

3. The affidavits on which petitioners rely were filed only for the purpose of opposing the respondents' motion for interlocutory injunction, and respondents were never apprised in the District Court that they were called on to respond to them in any other connection.

It is beside the point to cite cases holding that a defendant before answer may by motion traverse the allegations of jurisdiction and place plaintiff on proof (e.g., *KVOS, Inc. v. Associated Press*, supra), for petitioners made no motion. It is

also beside the point to say that a court may of its own motion require the jurisdictional facts to be established by evidence before trial of the merits. Whether the power is based on Section 37 of the Judicial Code or on the power to grant a speaking motion to dismiss, where the court of its own motion causes jurisdictional inquiry to be made, it must do so "either by having the proper issue joined and tried, or by some other form of appropriate proceeding" (*Wetmore v. Rymer*, 169 U.S. 115, 122). Unless the plaintiff is apprised that he is called on to give evidence "as to the verity of the jurisdictional fact," an order of dismissal based on factual conclusions contrary to allegations of the complaint will be invalid (cf. *Davis v. Schackleford*, supra, and cases there cited). This is the law under Section 37. On a speaking motion, if matters outside the pleading are presented in support of the motion and not excluded, all parties must be given reasonable opportunity to present all material pertinent to a motion for summary judgment under Rule 56 of the *Rules of Civil Procedure*.[41]

Here plaintiffs were never apprised that they were expected to engage in preliminary trial of the merits to protect jurisdiction.

Petitioners argue that respondents were "apprised." But apprised of what? Apprised, they say (Brief, pp. 28, 29) that "their complaint might be dismissed on jurisdictional grounds." But this is not the matter of which it was necessary that they be apprised. What it was necessary that respondents be apprised of, before the District Court acting on its own motion could dismiss the case for lack of jurisdiction upon a determination of facts contrary to the allegations of the complaint and on the basis of matter outside the complaint, was that the court in-

[41]Cf. proposed amendment to Rule 12(b) in "Report of Proposed Amendments to the Rules of Civil Procedure for the District Courts of the United States" submitted by the Advisory Committee on June 14, 1936.

tended to make such a *factual* inquiry and determination. Respondents were not apprised, at any time, in any way, that the jurisdiction was to be determined other than on the face of the complaint or that the truth of the allegations of the complaint was to be tried. We refer to the discussion at pages 12-16, supra. Particularly, respondents were not apprised that the question was to be tried on *affidavits*, or that petitioners' affidavits, offered in opposition to the motion for an interlocutory injunction, were to be referred to in testing the truth of facts upon which the "jurisdiction" rested.

4. *Wetmore v. Rymer*, supra, shows that even in a case involving jurisdictional amount, where the trial court decides to try the facts involved in the jurisdictional issue itself rather than let it go to the jury, "its action *must* take a form that will enable this Court to review it, so far as to determine whether the conclusion of the court below was warranted by the evidence before that court." Here it is patent that, even if the District Court did presume to try and decide any question of fact—which is not the case, its action was not cast into the necessary form, for it made no findings of fact, or anything resembling findings.

The Rules of Civil Procedure "contemplate a determination" of all issues of fact after a hearing, "and that the trial court shall make findings of fact and conclusions of law, to the end that the parties to the litigation and the reviewing court may know the exact factual and legal basis for the trial court's decision." *Publicity Building Realty Corporation v. Hannegan*, 139 F.2d 583, 587 (8 Cir.). And this Court may not be asked to decide factual issues until the facts have been found below. *Panama Mail S.S. Co. v. Vargas*, 281 U.S. 670; *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316; *Borden's Co. v. Baldwin*, 293 U.S. 194, 213.

Conclusion

Respondents respectfully submit that their complaint states a claim for relief and that their suit is not an action against the United States or barred by sovereign immunity.

We submit that the judgment of the District Court dismissing the action was erroneous, and that the decision of the Court of Appeals is correct and should be affirmed.

Respectfully submitted,

Dated: January 17, 1947.

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(APPENDIX FOLLOWS)

APPENDIX I.

Statement prepared from the Commission's own Reports to Congress.

This is the statement referred to at page 116 of the foregoing brief. We submit that it establishes the six facts enumerated on page 117, and it may be read in conjunction with the nine principles enumerated on pages 57, 58.

In this recital when we speak of the "debtor" we refer to Dollar of Delaware and when we speak of the "creditor" we refer to the Commission. By "Blue Book" we refer to the report of April 10, 1939, and by "First Report" we refer to the report of February 17, 1938.

The debtor operated with financial success (Blue Book, 14, 15) until the depression of 1929 and the early thirties as the result of which "volume of traffic and freight rates were seriously down" (Blue Book, 17). In 1936 the Pacific Coast maritime strike "interrupted the service of the vessels" and "revenues were thereby cut off" (Blue Book, 22). On top of these reverses, the creditor in this situation declined to pay to the debtor *earned* mail pay (Blue Book, 22). And then, as of June 30, 1937, the mail contracts were cancelled under the *Merchant Marine Act of 1936* (Title 46, *U.S.C.*, Sec. 1141-1143). That Act provided for the settlement and payment by the Commission of all claims for damages arising out of the premature termination of the contracts (First Report, p. 2), and the Commission was under a statutory duty to enter into a settlement agreement for payment to claimants of what it believed to be a fair adjustment and to pay such sum (Title 46 *U.S.C.*, Sec. 1142(b)). As a result of the cancellation, the debtor had a claim against the United States. *The creditor believed that the claim was valid in a substantial amount* (Blue Book, p. 34), but, in order to weaken the debtor's

position and to aid the creditor to obtain control of its management, the creditor refused to settle or adjust the claim or to make any payment. As December 31, 1937 was the last day allowed by the Act for filing suit in the Court of Claims for damages for the cancellation of mail contracts, the debtor was compelled to file a petition in that court seeking recovery of nearly $6,000,000.00 (First Report, p. 28).

The Act also provided for so-called direct operating differential subsidies in lieu of ocean mail contracts. These subsidies were for the sole purpose of placing the operation of vessels of American operators on a parity with those of foreign competitors.

But the creditor refused to grant to the debtor any such subsidy (cf. First Report, p. 2), despite the creditor's avowed belief that "The Company obviously could not maintain its services after June 30, 1937, without a subsidy" (Blue Book, p. 23).

Notwithstanding the cutting off of revenues by the cancellation of the mail contracts, the refusal of the creditor to settle the claims of the debtor for damages arising from the cancellation, and its refusal to grant an operating differential subsidy, the debtor continued to maintain service on its transpacific and round-the-world lines without government aid or assistance in any form until January 25, 1938.

In the midst of its difficulties, disaster struck the debtor again; its steamship "President Hoover" was wrecked off Formosa:

> "This jeopardized the proposed plan of reorganization and made it impossible for the plan to be completed by December 31, 1937, the date of expiration of the Company's agreements with its trade creditors and with the Bank. It was obvious that the *Hoover* loss would have an adverse effect on the possible earnings of the Company, although the fact that it was insured in excess of the mortgage indebtedness would reduce the Company's indebtedness." (Blue Book, p. 33).

But the creditor withheld payment of the insurance proceeds (Blue Book, p. 3) and only released small sums to the debtor from time to time "to enable the company to meet pressing obligations and avoid a complete shut-down of its services" (Blue Book, p. 4).

Meanwhile, too, mail pay for carrying the mail prior to cancellation of the mail contracts was due the debtor, but the creditor refused to pay, and it offset the sums due against the mortgage debt for the avowed purpose of gaining an advantage in the event the debtor went into 77B reorganization (Blue Book, 28). "This action of the Commission [in offsetting the mail pay] had the necessary consequence of making the entire first plan of reorganization impossible of fulfillment * * *" (Blue Book, 28).

Finally the creditor offered a *temporary* six months' operating differential subsidy. But it offered even that limited subsidy only on condition, *inter alia*, (1) *that the debtor release, without any consideration whatever, its claim of nearly $6,000,000.00* for damages arising from cancellation of the ocean mail contracts, (2) that respondent Dollar of California and affiliated companies, who were at that time creditors of the debtor in an aggregate amount exceeding $1,338,900.00, release their creditor claims in exchange for preferred stock, thereby subordinating their position to one of inferiority to the continued creditor position of the Commission, (3) that, while the creditor would extend the maturity date of that portion of the indebtedness which was then due, the debtor and the co-obligors must agree that in the event no further subsidy should be granted by the creditor, on the termination of the temporary six months' subsidy, the creditor could accelerate the due date of the entire debt and declare it due and payable immediately, although a substantial portion of the debt was not yet due or payable and but for such an acceleration would not be due for a matter of years, (4) that the

creditor be permitted to select one member of the Board of Directors and otherwise limit the right of the stockholders to select the directors, and (5) that a half million dollars of new capital be placed in the company by the Dollar interests (First Report, pp. 5-10).

Under compulsion of its necessitous condition, the debtor and its stockholders were compelled to, and did, accept the terms and conditions. The claim of nearly $6,000,000.00 was released, without the receipt of one cent payment, and respondent Dollar of California and the other Dollar companies, by April 1938, accepted preferred stock in lieu of their claims as creditors. To this end the debtor was compelled to enlarge its capital by the creation of preferred stock, a wholly new class of stock. And on January 25, 1938, the temporary subsidy contract was entered into with the creditor. (First Report, pp. 11-31, particularly pp. 22-26, 28, 30).

The stockholders would have been justified in assuming that on compliance with these previous conditions, a long-range subsidy would be arranged. But the consequences of this transaction and the light in which the Commission regarded it are disclosed by it in the Blue Book, thus (at p. 34):

> "It should be noted in this connection that on December 30, 1937 the Dollar Line and its parent company, Dollar of California, filed a petition in the Court of Claims against the United States for almost $6,000,000 based upon the cancellation of mail contracts. While many of the claims were of doubtful validity and while the Commission was believed to have well-grounded counterclaims, nevertheless, *the best judgment of the Legal Division was that the Dollar Lines might obtain some recovery as a result of the statutory termination of the contracts.*
>
> * * * * * *
>
> "On the other hand, if the subsidy agreement could be worked out, *the litigation would be completely disposed of without cost to the Government, and would cease to be an embarrassing factor* if at the end of the six months'

period no final plan of financial readjustment could be worked out, and a judicial reorganization might then become necessary."

Thus in granting the temporary subsidy the Commission was motivated not merely by a legitimate desire *as the United States Maritime Commission* to assist American shipping, as required by law, but also by the desire, *as creditor*, to dispose of litigation without cost to the government and to eliminate a factor that would embarrass it in its creditor demands at the end of six months. And then the creditor gloatingly described the consequences of the fact that the debtor had released, without any consideration whatever, its claim for damages for termination of the mail contracts and of the fact that respondent Dollar of California and the other Dollar companies had relinquished their positions as creditors and had accepted the subordinate position of preferred stockholders:—

"Consequently, their bargaining position was much weaker." (Blue Book, 36).

Thus, having deliberately and avowedly forced the necessitous debtor into a much weaker bargaining position by various means, such as denial of relief admittedly due for cancellation of the mail contracts, the creditor began immediately to press for more and more security, and it did so primarily to obtain voting control and control of the management until the debt was paid.

In the very first paragraph of the Blue Book the creditor summarizes the events transpiring after January 25, 1938 as follows:

"The purpose of this report to Congress is to summarize in like manner the further steps taken by the Commission since January 25, 1938 *which culminated in the acquisition by the Commission of stock control* of Dollar Steamship Lines, Inc., Ltd. (now called American President Lines, Ltd.), the granting of a 5-year operating differential subsidy to that company, and the making of loans for repairs

by the Commission and for working capital and other purposes by the Reconstruction Finance Corporation."

We call attention to the fact that the report here emphasizes acquisition of *stock control*, not the acquisition of ownership, striking confirmation that the dominant purpose of the agreement of August 1938 was to obtain control as a security (see pages 47-49, supra).

The report continues by describing the negotiations after January 25, 1938 thus:

> "In the meantime there had been discussions between members of the Commission's staff and Mr. R. Stanley Dollar, with regard to *certain additional conditions contemplated by the plan, to be met by the Dollar interests, including particularly a pledge of the voting stock.* In view of the requirement of the Reconstruction Finance Corporation that the existing mortgage debt of $7,500,000 held by the Commission be subordinated to the new loan to be made by that agency, *the obtaining of additional security for the subordinated indebtedness was a matter of prime importance.* Accordingly, on April 26, 1938, representatives of the Commission, pursuant to its instructions, advised Mr. R. Stanley Dollar that the Commission was unwilling to grant a 5-year operating differential subsidy agreement, to make advances for repairs, or to subordinate its present mortgage loans to the new funds advanced by it and the Reconstruction Finance Corporation, *unless stock control of Dollar Steamship Lines, Inc., Ltd. was deposited with the Commission or its nominee.*" (Blue Book, pp. 4-5).

The creditor wanted a pledge not only of all B stock owned by respondents and their affiliated interests but also of their A stock (Blue Book, 44). In reply the debtor and allied interests advised the creditor that they were not willing to pledge their stock but would consider a transfer of the voting control.

> "On the following day, April 27, 1938, the Commission having been advised that the Dollar interests *were unwill-*

ing to pledge their stock but were considering at most a transfer of voting control for the purpose of electing directors, decided to advise Mr. Dollar in writing of the minimum terms and conditions upon which the Commission would enter into the long-term subsidy agreement. Such a letter was approved by the Commission on April 28, 1938, and transmitted to Mr. Dollar." (Blue Book, p. 5).

Thus the difference between the debtor and the creditor at this point was merely with respect to the extent of additional security.

The substance of the letter of April 28, 1938, just mentioned, is summarized thus:—

"The conditions of the commitment, speaking generally, called for the *pledge* by the Dollar interests *of all the collateral which the commission considered was available as security for the indebtedness to be subordinated. These conditions also included the securing of firm voting control by the Commission.*" (Blue Book, p. 5).*

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*The series of events described above are summarized elsewhere in the Blue Book as follows (pp. 39-40):

"In the meantime there had been discussions between members of the staff and Mr. Dollar with regard to certain additional conditions contemplated by the plan to be met by the Dollar interests, including particularly the pledging of the voting stock. It was reported to the Commission on April 26 that members of the Long Range Subsidy Committee had discussed with Mr. Dollar the possibility of pledging certain securities held by the Dollar interests as security for the proposed subordination of the mortgages held by the Commission but no commitments had been made.' The minutes of that day set forth:

"It was the sense of the Commission that Mr. Dollar be informed that the Commission was unwilling to grant a 5-year operating differential agreement unless stock control of the Dollar Steamship Line, Inc., Ltd. was deposited with the Commission or its nominee.

"The Commission having been informed on April 27, 1938, that the Dollar interests were unwilling to pledge their stock but were

This letter again shows that the dominant motive of the creditor was to obtain collateral, primarily for the purpose of control. By "all the collateral which it was thought was available," the creditor meant a pledge by the debtor of other property owned by it and a pledge by the controlling stockholders and affiliated interests of all their controlling stock and *also of essentially all other property which they or any of them owned.* And the creditor *also insisted that each and every one of those parties should guarantee the complete and entire indebtedness of the debtor.* Above all other demands, the creditor insisted upon securing firm voting control of the debtor to secure that indebtedness.

By reply of May 26, 1938 the debtor acquiesced in much but not all of the demands made by the creditor in its letter of April 28th:—

> "This reply was considered by the Commission to be unsatisfactory because some of the proposed guarantors refused to make any guaranty, while others hedged their agreements to guarantee in such manner as to make their guaranties worthless." (Blue Book, p. 99).

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considering at most a transfer of voting control, at least for the purposes of electing directors, the Commission directed that a letter be drawn up for submission to Mr. Dollar setting forth in detail the minimum terms and conditions under which the Commission would enter into the permanent subsidy agreement. * * * The April 28 letter committed, subject to compliance with its terms, the Commission to subordinate its existing debts, to lend up to $1,500,000 for repairs, to grant a 5-year subsidy and to rearrange the amortization requirements on the present debt. All this, however, was contingent upon compliance with the conditions of the letter. These conditions, speaking generally, *called for the pledge by the Dollar interests of all the collateral which it was thought was available as security for the indebtedness to be subordinated.* These conditions also had as an objective the securing of *firm voting control* to be exercised if trouble arose."

But the creditor concluded that it could modify some of the details of its demand in favor of the debtor and its stockholders:—

> "However, as to certain details involved in the Commission's letter of April 28th, it was felt by the Commission that the position of the Commission should be somewhat modified. Accordingly, on June 3, 1938, the Commission took under consideration a tentative draft of a resolution which should specify the minimum terms and conditions under which the Commission would carry out the commitments set forth in the letter of April 28, 1938. On the following day the Commission approved the resolution in final form and directed that it be transmitted to the company." (Blue Book, 5, 6).

Also (Blue Book, 99):

> "The Commission therefore considered it advisable to reconsider its requirements and, in the light of such reconsideration, to restate them in a more formal manner. Accordingly, a resolution was adopted on June 4, 1938, which modified the April 28, 1938, letter in substance, as follows:
>
> "(a) The guaranty of Dollar of California was to be limited to the amount of the present guaranties on the Dollar notes of approximately $3,575,000.
>
> "(b) The guaranty of The Robert Dollar Co. was to be limited * * *.
>
> "(c) An additional requirement was inserted for a guaranty by H. M. Lorber secured by his stockholdings in Dollar of Delaware, Dollar of California, and The Robert Dollar Co., but with his liability limited to the collateral.
>
> "(d) The guaranty of Estand, Inc., required by the April 28, 1938, letter was eliminated."

Thus the resolution of June 4th was essentially a reaffirmation of the demand of April 28th somewhat modified in the direction of leniency. *It was still a request for collateral*, the insistence still being an additional collateral and guarantees from

members of the Dollar interests, not only the pledge of the A and B stock of the debtor but of numerous other properties owned by respondents.

On June 17, 1938 the debtor replied to the creditor's demand of June 4th. The reply is not set forth in the Blue Book, but the summary of it appearing there emphasizes the collateral nature of the eventual transaction agreed to less than two months later.

According to the Blue Book, the letter of June 17th proposed two alternatives: First, that the creditor *buy* the ships owned by the debtor and satisfy the debt out of the purchase price; second, that the class B stock be transferred to the creditor in lieu of the personal liability of respondents R. Stanley Dollar and Dollar of California. Thus the Blue Book states (pp. 99-100):—

> "On June 17, 1938, Mr. Dollar replied to the resolution by a telegram followed by a letter which, with enclosures, in effect constituted a refusal to agree to the terms of the resolution and which contained a counterproposition for the purchase of the vessels at a price of approximately $18,000,000."

The alternatively suggested transfer of the B stock was to give the creditor the security of having voting control:—

> "The telegram and letter, however, contained certain tentative suggestions that the Commission acquire the vessels of the Dollar Line or that it acquire the class B common stock, *which stock carried with it the voting control of the company.* Acquisition of the vessels at the figures suggested by the Dollar interests was not considered within the realm of practicability." (Blue Book, p. 6).

Although the Blue Book does not contain but merely purports to summarize, the debtor's reply of June 17, 1938, a purported copy of the reply is attached to Land's affidavit as Exhibit B (R. 31). This letter made no suggestion whatever that any stock be transferred to the creditor but, after stating willing-

ness to acquiesce in some of the creditor's demands of June 4th, suggested that the creditor buy the debtor's vessels at $18,550,000 and pay off the debt in entirety from the proceeds. This letter also forwarded to the creditor copies of letters that had been received by the debtor from several of its stockholders in response to the creditor's demands of June 4th. Respondent R. Stanley Dollar's letter (R. 35) suggested transfer of the ships in payment of the entire indebtedness. Respondent Lorber's letter (R. 35, 36) suggested his willingness "to *pledge* my holdings of 9174 shares of Class A stock," *the exact shares that be in fact transferred under the agreement of August 1938.* Respondent Dollar of California's letter. (R. 37, 38) suggested the transfer to the Commission of its B stockholdings in Dollar of Delaware and its discharge as co-maker on the debtor's notes; there is not a word in this letter to characterize the transfer as being an outright divesting of title or to show that what had been proceeding as negotiations for better security suddenly became transmogrified into an outright transfer of property.

At the time the debtor forwarded these suggestions to the creditor on June 17, 1938 and thereby suggested that the creditor buy the debtor's ships and pay off the indebtedness from the proceeds, the ships were well worth the entire indebtedness:—

> "Furthermore although the vessels have a world market value somewhat in excess of the mortgages on them, their value for the purpose of making part payment by way of 'trade-in' on a new construction program is so restricted by statutory limitations upon the amount which can be allowed as part payment, that they could not be taken in, *generally speaking*, for more than the mortgages." (Blue Book, p. 44; italics are in the original).

Since the ships had been purchased from the United States Shipping Board (First Report, p. 1), they could not be sold to non-American operators without the consent of the creditor

(Title 46 *U.S.C.* Sec. 808, 864). No American operator could operate them in competition with foreigners without an operating differential subsidy, the granting of which was also in the control of the creditor. Thus, although the debtor's assets were admittedly worth more than enough to pay the debt, the creditor was in the unique position of controlling the market for these assets and the price at which the debtor could sell them, and the creditor thus had the debtor at its absolute mercy.

Upon receipt of the communication of June 17th, the creditor considered the choices available to it for the protection of the indebtedness: It could institute a mortgage foreclosure proceeding against the debtor, but this it did not want to do because foreclosure on its present security would impair its chances of collecting the debt, not improve them (Blue Book, pp. 6, 7). The alternative to foreclosure was to grant a long-term subsidy and to subordinate its $7,500,000 indebtedness to new money to be borrowed by Dollar of Delaware from the Reconstruction Finance Corporation. If the creditor should follow this course, two further alternatives presented themselves:—it could subordinate its debt and grant the subsidy either with or without further or better security, i.e., (a) require no financial guarantees and stock control as it had requested by the resolution of June 4, 1938, or (b) negotiate with the Dollar interests to obtain the transfer of substantially all of the common stock. The first of these two it was unwilling to do, and it chose to pursue the second course. The foregoing is stated in the Blue Book at pages 7, 8, and is again stated thus:—

> "The suggestion as to the acquisition of the vessels was not a practicable one and was not considered at the meeting of the Commission on June 21, 1938, in which various alternative causes of action were under consideration. * * * Unless the Commission was ready to consider immediate institution of foreclosure proceedings, there were only two alternatives. The first was to carry out the Houlihan-Wil-

cox' plan with the modification which included subordination of the present mortgage indebtedness. This the Commission declined to do. The Commission then considered the other alternative of negotiating with the Dollar interests for accomplishment of the suggestions advanced in their telegram of June 16 and their letter of June 17. These suggestions included the transfer to the Commission of substantially all of the voting stock of Dollar of Delaware, the acquisition of The Robert Dollar Company assets and other matters." (Blue Book, p. 40).

The Houlihan-Wilcox plan was one recommended by the creditor's own representatives to grant a long term subsidy and subordinate the debt to a new loan to be granted by the Reconstruction Finance Corporation without requiring further security (Blue Book, pp. 3, 7, 8), upon transfer of voting control to nominees satisfactory to the creditor (Blue Book, p. 97). This plan was unacceptable to the creditor because:—

"This proposal would, in effect, charge the Commission with responsibility for the company's operations and management without conferring upon the Commission *the right of control* which inheres in stock membership. Indeed, the proposal as set forth above, affords the Commission less control than was provided in the temporary subsidy agreement, wherein the company agreed that its management, including its board of directors, would 'at all times' during the period of the agreement 'be satisfactory to the Commission.' Such 'satisfactory' management was a condition to the continuance of the subsidy agreement." (Blue Book, pp. 98, 99).

Obviously a right of control inherent in stock membership, sufficient to protect the Commission, would be conferred by receipt of stock as collateral.

"Accordingly the Commission sent on June 21, 1938, a telegram to its special counsel in California, outlining the basis on which such negotiations should be conducted" (Blue Book, 8).

The transaction proposed in that telegram is substantially the transaction expressed in the agreement of August 15th.

That the creditor was still talking about additional collateral is obvious from a comparison or contrast of the two alternatives to which it was referring. The first was to subordinate the indebtedness to new money without requiring additional collateral, and the other was to negotiate for *some* collateral, and the character of the additional collateral is specified as the acquisition of the stock.

That the acquisition of the stock was by way of collateral is also demonstrated by the emphasis placed by the creditor on its acquisition of the control of the management. Describing the effect of the transaction of August 1938 the creditor explains:—

> "As to management, the complete control of the Company, which will be obtained under the adjustment plan, puts the Commission in the position of being able to insist upon whatever type of management it may deem best throughout the period of the subsidy * * * (Blue Book, p. 49).
>
> * * * * * * *
>
> "Under the present adjustment plan which the Commission has already approved, the last grasp of the controlling interests upon the management is to be relinquished. The divorcement of these interests from any control over the affairs of the Company, which was partly effected in January of this year, will, upon consummation of the present plan, be made absolute." (Blue Book, p. 50).

The emphasis here is upon the transaction as one which divorced the Dollars from control over the management of the company, not as one which eliminated them from any ownership of an equity and destroyed the right of redemption.

The dominant motive of the creditor, from the earliest stages of the negotiations to the final agreement, as one to obtain management control, and the unchanged character of the transaction from the beginning to the end, are clearly reflected, too, in the following passage:—

> "From the very early stages of the negotiations which ultimately led to the plan for a long-term financial rehabilitation of Dollar of Delaware, it was recognized that effective voting control of the company must be obtained by the Commission." (Blue Book, p. 60).

The creditor's purpose in requesting, insisting upon, and entering into the transaction evidenced by the contract of August 15, 1938, was to acquire voting control and the control of the management of the debtor until the repayment of the indebtedness. It also desired control of the management during the five year subsidy period, but holding the stock in pledge to secure the debt would give it that control and it so believed at the time. It believed in August 1938 that the indebtedness would not be paid for a period of five years but that it would thereafter be paid. Thus it believed that the period of the contemplated five-year subsidy would be less than the period during which the debt would remain outstanding. (Blue Book, pp. 44, 49). Indeed, five years and one month later, the debt was paid.

For the transfer of the stock the creditor paid no consideration. It reported (Blue Book, p. 62):—

> "There was no monetary consideration given by the Commission for the acquisition of any of the shares or option rights mentioned above; the sole consideration being the release of R. Stanley Dollar and Dollar of California from their liability with respect to mortgage obligations of Dollar of Delaware to the Commission."

This passage may be read in connection with the discussion at pages 55-56, supra.

In view of the fact that the creditor's indebtedness was secured by mortgages on all the ships of the debtor, and that those ships were essentially all the debtor's assets, the capital stock of the debtor represented in substance the equity of redemption of the debtor's owners. An outright transfer of stock

to the creditor would have constituted a transfer and a relinquishment by the debtor to the creditor of the equity of redemption in circumstances of necessity and pressure.

The acquisition of a greater interest in the stock than as security would have constituted the seizure of an unconscionable advantage, as the result of which the creditor would now have obtained complete repayment of the indebtedness due it and yet solely as the result of the one time existence of the indebtedness would now be the owner of over two-thirds of the debtor and its assets and of over 92% of its voting control. We submit that the facts and circumstances are such that equity cannot permit the agreement of August 15, 1938 or the deliveries of stock made under it to be treated as anything but a security transaction.

APPENDIX II.

PUBLIC LAW 404—79TH CONGRESS
CHAPTER 324—2D SESSION
[S. 7]

TITLE

SECTION 1. This Act may be cited as the "Administrative Procedure Act".

DEFINITIONS

SEC. 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes

any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

* * * * * * *

(f) SANCTION AND RELIEF.— "Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

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SANCTIONS AND POWERS

SEC. 9. In the exercise of any power or authority—

(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

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JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone

the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

CONSTRUCTION AND EFFECT

SEC. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Approved June 11, 1946.

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SUPREME COURT OF THE UNITED STATES

No. 207.—October Term, 1946.

Emory S. Land (Chairman, United States Maritime Commission), Howard L. Vickery (Vice Chairman, United States Maritime Commission), et al., Petitioners, v. R. Stanley Dollar, Dollar Steamship Line, The J. Harold Dollar Estates Company, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 7, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners are present and former members of the United States Maritime Commission. Respondents are stockholders of Dollar Steamship Lines, Inc., Ltd. (Dollar of Delaware), whose corporate name was changed to American President Lines, Ltd., subsequent to the execution in 1938 of a contract out of which the present litigation arises. By 1937 Dollar of Delaware was in difficult financial straits. The problems confronting it and the various steps taken to remedy the situation need not be recapitulated here.[1] It is sufficient for purposes of the various questions presented by this case to say that the Commission and respondents entered into a contract in 1938 by which respondents delivered their common stock in Dollar of Delaware, endorsed in blank, to the Commission; and the Commission released some of respondents from certain

[1] The details of the difficulties, and the steps taken to remedy them are contained in two reports to Congress by the Commission: (1) Financial Readjustments in Dollar Steamship Lines, Inc., Ltd., dated February 17, 1938; (2) Reorganization of American President Lines, Ltd., dated April 10, 1939.

obligations and agreed to grant Dollar of Delaware an operating subsidy and to make a loan to it and to obtain for it another loan from the Reconstruction Finance Corporation.

The subsidy was granted and the loans were made. By 1943 American President Lines, Ltd., had fully paid all indebtedness due the United States. Respondents thereupon demanded return of their shares of stock from the then members of the Commission, claiming that the shares had only been pledged as collateral for a debt which had been paid. The members of the Commission refused to surrender the shares, claiming that they had not been pledged under the 1938 contract but transferred outright. Acting on that theory the Commission had indeed offered the shares for sale and had under consideration substantial offers to purchase them.

Thereupon respondents instituted the present suit in the District Court for the District of Columbia, see 11 D. C. Code, §§ 301, 305, 306, claiming that petitioners were unlawfully in possession of respondents' stock and illegally withholding it. The prayer was that petitioners be restrained from selling the shares and be directed to return them to respondents. Respondents moved for a preliminary injunction. Petitioners submitted affidavits opposing the motion. After a hearing, the District Court on its own motion dismissed the complaint with prejudice, holding that the suit was against the United States. The Court of Appeals reversed. 154 F. 2d 307. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.[2]

First. The facts asserted in the affidavits support the view that the 1938 contract called for the outright transfer

[2] Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U. S. 373, 377.

of the shares, not for their pledge. But we put the affidavits to one side for two reasons. In the first place, the function of the affidavits was to oppose the motion for a preliminary injunction. The case had not been submitted for decision on the merits. Issue, indeed, had not yet been joined. And the ruling of the District Court, as we read it, was based on the premise that since the Commission had the right to make the contract, the suit was against the United States.[3] Hence we do not think the District Court in fact relied on the affidavits in dismissing the complaint. In the second place, although as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings,[4] this is the type of case where the question of jurisdiction is dependent on decision of the merits.

The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondents' property under the claim that it belongs to the United States. That conclusion would follow if either of respondents' contentions was established:

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[3] The District Court said: ". . . I think . . . that the Commission had the legal right; and therefore I think it is inescapable that this is a suit against the United States and therefore that the complaint must be dismissed. . . ."

[4] In passing on a motion to dismiss because the complaint fails to state a cause of action, the facts set forth in the complaint are assumed to be true and affidavits and other evidence produced on application for a preliminary injunction may not be considered. *Polk Co.* v. *Glover*, 305 U. S. 5, 9; *Gibbs* v. *Buck*, 307 U. S. 66, 76. But when a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion, Judicial Code § 37, 28 U. S. C. § 80, Fed. R. Civ. P. 12 (h), the court may inquire by affidavits or otherwise, into the facts as they exist. *Wetmore* v. *Rymer*, 169 U. S. 115, 120–121; *McNutt* v. *General Motors Corp.*, 298 U. S. 178, 184 *et seq.*; *Kvos, Inc.* v. *Associated Press*, 299 U. S. 269, 278. As stated in *Gibbs* v. *Buck*, *supra*, pp. 71–72, "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court."

(1) that the Commission had no authority to purchase the shares or acquire them outright; or (2) that even though such authority existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares.

If respondents are right in these contentions, their claim rests on their right under general law to recover possession of specific property wrongfully withheld. At common law their suit as pledgors to recover the pledged property on payment of the debt would sound in tort.[5]

If viewed in that posture, the case is very close to *United States* v. *Lee*, 106 U. S. 196. That was an action in ejectment to recover possession of a tract of land. The defendants were military officers who, acting under orders of the President, took possession of the land and converted one part into a fort and another into a cemetery. For the lawfulness of their possession they relied on a tax sale of the property to the United States. On the trial it was held that the claim of the plaintiffs to the land was valid and that the defendants were wrongfully in possession. The Court affirmed the judgment over the objection that the suit was one against the United States. It held that the assertion by officers of the Government of their authority to act did not foreclose judicial inquiry into the lawfulness of their action; that a determination of whether their "authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question." P. 219. It further held that while such an adjudication is not *res judicata* against the United States because it cannot be made a party to the suit, the courts have jurisdiction to resolve the controversy between those who claim possession. And it concluded that an agent or officer of the United States who acts beyond his authority is answerable for his actions. And see *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619–620; *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 258 U. S. 549, 567.

[5] Restatement of the Law of Torts, §§ 223, 237; 3 Street, Foundations of Legal Liability (1906), p. 160.

Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States* v. *Lee*, *supra*, has been repeatedly approved. *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446, 452; *Tindal* v. *Wesley*, 167 U. S. 204; *Smith* v. *Reeves*, 178 U. S. 436, 439; *Scranton* v. *Wheeler*, 179 U. S. 141, 152–153; *Philadelphia Co.* v. *Stimson*, *supra*, pp. 619–620; *Goltra* v. *Weeks*, 271 U. S. 536, 545; *Ickes* v. *Fox*, 300 U. S. 82, 96; *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 50–51. That rule is applicable here although we assume that record title to the shares is in the Commission. In *United States* v. *Lee*, *supra*, record title of the land was in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. Though the judgment was not *res judicata* against the United States, p. 222, it settled as between the parties the controversy over possession. Precisely the same will be true here, if we assume the allegations of the petition are proved. For if we view the case in its posture before the District Court, petitioners, being members of the Commission, were in position to restore possession of the shares which they unlawfully held.

We do not trace the principle of *United States* v. *Lee*, *supra*, in its various ramifications. Cases on which petitioners rely are distinguishable. This is not an indirect attempt to collect a debt from the United States by preventing action of government officials which would alter or terminate the contractual obligation of the United States to pay money. See *Wells* v. *Roper*, 246 U. S. 335; *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371. It is not an attempt to get specific performance of a contract to deliver property of the United States. *Goldberg* v. *Davis*, 231 U. S. 218. It is not a case where the sovereign admittedly has title to property and is sued by those who seek to compel a conveyance or to enjoin

disposition of the property, the adverse claims being based on an allegedly superior equity or on rights arising under Acts of Congress. *Cunningham* v. *Macon & Brunswick R. Co., supra*; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Nagayab* v. *Hitchcock*, 202 U. S. 473; *Louisiana* v. *Garfield*, 211 U. S. 70; *Morrison* v. *Work*, 266 U. S. 481. And see *Stanley* v. *Schwalby*, 162 U. S. 255, 271–272.

We say the foregoing cases are distinguishable from the present one, though as a matter of logic it is not easy to reconcile all of them. But the rule is based on practical considerations reflected in the policy which forbids suits against the sovereign without its consent. The "essential nature and effect of the proceeding" may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration. *Ex parte New York*, 256 U. S. 490, 500, 502. If so, the suit is one against the sovereign. *Mine Safety Co.* v. *Forrestal, supra*, p. 374. But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.

It is in the latter category that the pleadings have cast this case. That is to say, if the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States, suit to recover them would of course be a suit against the United States. But if it is decided on the merits either that the contract was illegal or that respondents are

pledgors, they are entitled to possession of the shares as against petitioners, though, as we have said, the judgment would not be *res judicata* as against the United States. See *United States* v. *Lee*, *supra*, p. 222.

We intimate no opinion on the merits of the controversy. We only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits.

Second. Motions were made by the Solicitor General to substitute as defendants the new members of the Commission for those who are no longer members.* We added the new members as petitioners-defendants, and dismissed as to a deceased member, but reserved decision as to the other former members. 329 U. S. —. A majority of those joining in this opinion are of the view that it is more appropriate that both motions be considered by the District Court. The questions have not been briefed or argued here. Moreover, the present record may not present all the facts necessary for disposition of the motions. Accordingly, we vacate the order of substitution which we entered, so that the District Court may, on remand of the cause, pass on the motions unembarrassed by any action here.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

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* See Fed. R. Civ. P. 25 (d); *Allen* v. *Regents*, 304 U. S. 439, 444–445.

SUPREME COURT OF THE UNITED STATES

No. 207.—October Term, 1946.

Emory S. Land (Chairman, United States Maritime Commission), Howard L. Vickery (Vice Chairman, United States Maritime Commission), et al., Petitioners, v. R. Stanley Dollar, Dollar Steamship Line, The J. Harold Dollar Estates Company, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 7, 1947.]

Mr. Justice Reed, concurring.

As I think this proceeding states a cause of action against the United States Maritime Commission, I do not agree with the manner of disposition. No damages are sought against the petitioners. Relief is sought that can only be obtained by an order directed against the Commission.

A contract between plaintiffs, Dollar et al., and the United States Maritime Commission, was attached to the complaint as an exhibit. The contract was not signed by any individual member of the Commission but by the Commission through its duly authorized special counsel. In the complaint, respondents alleged that they and their predecessors in interest "caused said shares of stock of the company to be transferred to the United States Maritime Commission." They further alleged that they made demand upon the "Maritime Commission for the return of said stock in July, 1945. This request was denied by the Maritime Commission in July, 1945." The ultimate result sought by the complaint was that the respondents "be directed and ordered by this court to return the plain-

tiffs' stock, now in the unlawful possession and custody of the defendants, to the plaintiffs, the lawful owners." Taken as a whole, I cannot read the complaint otherwise than as alleging that title and possession of this stock is now in the United States Maritime Commission. Although plaintiffs assert possession in the defendants, the other allegations and the attached contract show that defendants hold the stock by virtue of their official positions as members of the Commission. If the basic allegations were proven, the Commission would be shown to be in possession of the stock under a claim of right.

If that is the correct interpretation of the complaint, it follows of course that the Maritime Commission is an indispensable party to this proceeding. See *Commonwealth Trust Co.* v. *Smith*, 266 U. S. 152, 159. No matter how far beyond their statutory powers the members of the Commission may have acted in contracting with the respondents or how illegal may be the retention of the certificate by the Commission under its claim of ownership through the contract, the transfer to the Commission, as alleged in the petition, put the title and possession of this property in the Maritime Commission and not in the petitioners as individuals. It may be that the Commission holds the stock wrongfully but if so, it can only be restored to the respondents by an act of the Commission. Under such circumstances, cases like *United States* v. *Lee*, 106 U. S. 196, are inapplicable. In the *Lee* case, an action in ejectment was brought to recover possession of land from officers of the United States who were wrongfully in possession of the land. That suit was not brought against the United States to compel the United States to retransfer title to the complainants or to quiet title in those who claimed against the United States. In *United States* v. *Lee*, the officer of the United States could be ejected from the real property involved without loss of title or right of possession to the United States. That is not the result

in this case. A piece of paper, the stock certificate, will be taken from the hands of the Maritime Commission and placed in the hands of plaintiffs by a court decree, if plaintiffs are successful. If the decree is to be effective, it will require the individual defendants to transfer the certificates by endorsement of the name of the Maritime Commission or delivery, if the certificate is still in the name of the plaintiffs. The situation is as if the United States had been ordered by the decree in the *Lee* case to convey title to and possession of the property to Lee. Plaintiffs do not here seek damages for past acts of petitioners. Plaintiffs want property now in the possession of the Maritime Commission and to secure this relief, plaintiffs, I should think, must implead the Commission. Whether the Maritime Commission holds the property by title unchallenged by the plaintiffs or challenged by the plaintiffs cannot, it seems to me, be determinative as to the necessity of making the Commission a party. See *Goldberg* v. *Daniels*, 231 U. S. 218.

Cases cited in the opinion of the Court as following the rule of *United States* v. *Lee* are not significant here. Two are similar cases of ejectment.[1] Other cases cited turn on liability of a soverign to suits.[2] Still others are those which enjoin an officer from proceeding illegally.[3] In *Goltra* v. *Weeks*, 271 U. S. 536, 539, 549, there was a suit by a lessee to enjoin officers of the United States from taking possession of boats leased to the plaintiff by the Government and also to return the boats already taken. The prayer for a return of the property contained the possi-

[1] *Tindal* v. *Wesley*, 167 U. S. 204; *Scranton* v. *Wheeler*, 179 U. S. 141.

[2] *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446; *Smith* v. *Reeves*, 178 U. S. 436; *Great Northern Ins. Co.* v. *Read*, 322 U. S. 47.

[3] *Ickes* v. *Fox*, 300 U. S. 82; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

bility of the issue here raised but this Court treated the proceeding as one to enjoin a threatened trespass.

The present suit is for the return to the plaintiffs of property held by the Maritime Commission under a contract which the Dollar interests allege called for a return of the certificates to them on payment of a debt. Such a suit, it seems to me, is an effort to get possession of property actually in the possession of the Maritime Commission. This cannot be done without joining the Maritime Commission as a party defendant. See *Goldberg* v. *Daniels*, 231 U. S. 218; *Wells* v. *Roper*, 246 U. S. 335; *Morrison* v. *Work*, 266 U. S. 481, 487; *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371.

As this appears to me as a suit against the Commission, I would affirm the judgment of the Court of Appeals, remanding this case to the District Court. There the questions of the suability of the Commission [4] and the effect of the Administrative Procedure Act of June 11, 1946, could be considered. There the merits of the controversy could be decided.

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[4] Merchant Marine Act, 49 Stat. 1988, § 207, as amended, 52 Stat. 954, § 2:

"The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381.